

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

EQUAL EMPLOYMENT OPPORTUNITY)	
COMMISSION,)	
)	
Plaintiff,)	Case No. CV 17-70
)	Green Bay, Wisconsin
vs.)	
)	July 13 2021
WAL-MART STORES EAST LP,)	8:28 a.m.
)	
Defendant.)	DAY 2

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE WILLIAM C. GRIESBACH
UNITED STATES SENIOR DISTRICT JUDGE

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Proceedings recorded by electronic recording,
transcript produced by computer aided transcription.



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P R O C E E D I N G S

(Call to Order of the Court at 8:28 a.m.)

THE COURT: Go ahead, be seated.

THE CLERK: The Court calls the case 17-CV-70, *Equal Employment Opportunity Commission vs. Wal-Mart Stores East, LP* for Day 2 of jury trial. Appearances remain the same.

THE COURT: Okay.

MS. VANCE: Attorney Carrie Vance for EEOC.

THE COURT: The clerk noted appearances are the same so we're fine.

MS. VANCE: I apologize.

THE COURT: The clerk advised me that you had an issue you wanted to address before the jury?

MR. MULHAIRE: Yes, Your Honor. So the first thing we're going to do this morning is read from a deposition of Bonnie Popp who was one of the comanagers of the store. We informed the defendant there were 14 lines that we had left out of our designations, and I take it that they have an issue with our adding them now so we wanted to give them a chance to raise that with the Court.

THE COURT: Okay.

MR. HARLAN: Good morning, Your Honor.

The only issue really is we just got this a few seconds ago, so I haven't even had a chance to review and see what counter-designations.

1 And moreover, Ms. Popp is actually going to be a
2 witness here. So if there's a need for her testimony on those
3 issues, she's going to be here as a live witness.

4 MR. MULAIRE: I guess two things. One, I thought the
08:30 5 issue of whether -- whether there's a deposition designation or
6 not wasn't the issue, but rather there's 14 lines in which she
7 basically recounts with one of the scheduling forms having asked
8 Marlo to sign it.

9 So it's not earth shattering testimony, but it's
08:30 10 relevant to other things that we had designated. There's a
11 discussion of the same form on the previous page of the
12 designations. And I guess what I would say is, defendant is
13 right if there's something that they feel they need to elicit
14 from her in light of that, it sounds like they're calling her in
08:30 15 their case and so I don't see any prejudice to this. It's only
16 14 lines, there's no objections in the text, and so if they need
17 another minute to look at it. But it doesn't seem all that
18 prejudicial to me.

19 THE COURT: And it's testimony you want to introduce
08:31 20 in your case-in-chief and she's not available to you at this
21 point. She may be coming for the defense, but you haven't --

22 MR. MULAIRE: And she's one of the comanagers of the
23 store. So, I mean, there's a couple of different bases in which
24 we can read in the deposition designations. She's a managing
08:31 25 agent of the defendant and so --

1 But, yes, we're just reading in a few of her
2 deposition designations. It's up to the defendant if they want
3 to call her live in their case.

4 THE COURT: I take it -- I mean, this isn't a hearsay
08:31 5 problem or anything like that because there's an agreement to
6 read some of her deposition, it's just the part that you're
7 asking for 14 more lines.

8 MR. MULAIRE: 14 lines.

9 THE COURT: Mr. Harlan, take a look at the 14 lines,
08:31 10 if you want another designation let us know. Otherwise, if
11 she's going to be here, it seems to me if there's anything extra
12 you want to get out of her, that would be a time to do it as
13 well. But it's up to you. Let the clerk know when you're ready
14 and I'll be out.

08:32 15 Is this your first witness?

16 MS. VANCE: Our first order of presentation will be
17 the dep designations of Ms. Popp.

18 THE COURT: And how long is that deposition portion
19 you intend to read?

08:32 20 MS. VANCE: I believe it takes five minutes.

21 THE COURT: That'll be nice and short.

22 MS. VANCE: Yes, Your Honor.

23 THE COURT: Okay. The whole deposition excerpt is
24 five to 10 minutes, or five minutes or so?

08:32 25 MS. VANCE: We actually did time it.

1 MR. MULAIRE: That one was either five minutes or
2 seven minutes and maybe it will be another 15 seconds longer.

3 THE COURT: How about your live witness, what's the
4 next live witness?

08:32 5 MS. VANCE: Adversely, Your Honor, we would call Robin
6 Castro, the other comanager of the store.

7 THE COURT: And he's outside, or she?

8 MS. VANCE: Ms. Castro -- defense is aware that she's
9 the first witness we're calling.

08:33 10 MR. HARLAN: Your Honor, in my quick read, just to
11 move this along and not to delay things, we would like lines 18
12 through 25 read in on page 59.

13 MR. MULAIRE: Could I have the line numbers one more
14 time?

08:33 15 MR. HARLAN: Sure. Page 59, 18 through 25.

16 MR. MULAIRE: That's fine, Your Honor.

17 THE COURT: Okay. Are we ready to go? Should we
18 bring the jury in?

19 (Discussion off the record.)

08:34 20 (Jury in at 8:34 a.m.)

21 THE COURT: Now, good morning, ladies and gentlemen.
22 Please be seated.

23 Now, this next witness is a woman, employee of Walmart
24 who the plaintiff intends to introduce testimony taken during
08:35 25 her deposition. The parties have agreed to some reading of

1 deposition excerpts.

2 You heard yesterday a deposition was used in some of
3 the testimony. And a deposition is testimony given by a witness
4 out of court but under oath, and you should treat the testimony
08:35 5 just as you would any other testimony that was here in court.

6 This particular witness, as I understand it, will be
7 testifying live later as part of the defendant's case, but the
8 plaintiff has elected to read some of the brief testimony to you
9 and that's what will occur now; is that right?

08:36 10 MS. VANCE: Yes, Your Honor.

11 THE COURT: And do I have a copy of this deposition?
12 Is that among the materials you've given me here?

13 MS. VANCE: Yes. The designations aren't in there,
14 Your Honor. That would have been filed before Thursday as an
08:36 15 attachment.

16 THE COURT: And the designation has been expanded a
17 little bit. Okay. Go ahead. You can proceed. And we're going
18 to have somebody -- the person playing the role of the witness
19 take the witness stand and testify, that's Ms. Carter will be
08:36 20 the witness.

21 MS. VANCE: The plaintiff will read excerpts from the
22 deposition of Bonnie Popp taken Tuesday, May 8th, 2018.

23 BONNIE POPP, PLAINTIFF WITNESS, VIA DEPOSITION

24 DESIGNATIONS READ AS FOLLOWS:

08:37 25 Q. Would you please state your full name.

1 A. Bonnie Sue Popp.

2 Q. Ms. Popp, when did you first have a reason to work with
3 Marlo Spaeth?

4 A. That would have been in 2010, when I was an assistant
08:37 5 manager.

6 Q. And explain what role you would have had as an assistant
7 manager in Marlo Spaeth's employment.

8 A. As an assistant it would have been CBWA, coaching by walking
9 around interaction to make sure she was on task, and that would
08:37 10 be it.

11 Q. What training as an assistant manager did you have?

12 A. We did classes out of our store. I don't know the -- I
13 don't know the timeframe, it's changed since then.

14 Q. And when you say "out of our store," were you trained for
08:38 15 the assistant manager position in the Chilton store or the
16 Manitowoc store?

17 A. I was trained for the assistant manager position in Green
18 Bay.

19 Q. And it sounds like the training was in a Walmart store in
08:38 20 Green Bay; is that correct?

21 A. Yes.

22 Q. In your 2010 assistant manager training in Green Bay, what,
23 if anything, did you learn from Walmart regarding how to respond
24 to discrimination in the workplace?

08:38 25 A. I do not recall.

1 Q. Do you recall whether you had any training at the 2010 Green
2 Bay class specifically regarding disability discrimination?

3 A. I do not recall.

4 Q. In Green Bay, at your assistant manager training, did you
08:39 5 learn about the process for requests for reasonable
6 accommodations?

7 A. No.

8 Q. Do you have any training, today, as of now, on the process
9 for requesting a reasonable accommodation at Walmart?

08:39 10 A. No.

11 (Exhibit 1002, Customer Service Scheduling
12 Availability - 02/16/2015 [D000021], admitted previously by
13 stipulation.)

14 Q. I'd like to direct your attention to the document that's
08:39 15 been admitted into evidence as Exhibit 1002. Do you recognize
16 this document?

17 A. Yes.

18 Q. And do I see your signature at the bottom that says
19 "facility manager's signature"?

08:39 20 A. Yes.

21 Q. Do you recall completing this document?

22 A. Yes.

23 Q. Where were you when you completed this document?

24 A. The personnel office.

08:40 25 Q. And was anybody else with you?

1 A. Specifically for this, no. I'm sure Karen was at her desk.

2 Q. And I'm sorry, did you call it the personnel office?

3 A. Yes.

4 Q. And that's a room where Karen Becker has her desk; is that
08:40 5 correct?

6 A. Yes.

7 Q. Okay. To your memory, was Karen Becker in the room when you
8 completed this form, Exhibit 1002?

9 A. Yes.

08:40 10 Q. Was anybody else in the room when you completed this
11 exhibit?

12 A. Not that I remember, no.

13 Q. Is it true that you wrote out the times in the part of the
14 form that has a row for start time?

08:40 15 A. Yes.

16 Q. And is it true that you wrote out the time in the part of
17 the row that has the information for stop time?

18 A. Yes.

19 Q. And I'd like to know what formed the basis of the times that
08:40 20 you wrote? Why did you write those times?

21 A. That would fall into help Marlo get hours of what this
22 computer based system was dropping.

23 Q. Before you filled out this form -- or as you filled out this
24 form, did you look up the current availability of Marlo Spaeth?

08:41 25 A. No.

1 Q. Now, once you completed this form what did you do with it?

2 A. Handed it to Karen.

3 Q. At which point in the process did Marlo Spaeth's signature
4 appear?

08:41 5 A. In the conversation that I had sitting at the personnel
6 table with Marlo explaining the scheduling and what was
7 happening, and I was explaining to her that for her to get hours
8 in the system this is what was happening and this is what we
9 needed to change her work schedule to, if she could do that.

08:41 10 She stated yes. And then I said, okay, so we're going to change
11 your schedules, and she said, yes. And she signed it.

12 Q. I had the impression she was not in the room when you were
13 filling this out; was Marlo Spaeth in the room when you filled
14 out the information in the start time row?

08:42 15 A. Yes.

16 Q. Was Marlo Spaeth in the room when you signed your name?

17 A. Yes.

18 Q. Did you have situations where the scheduling system
19 generated a schedule but you had to go in and manually enter
08:42 20 different times into an associate's schedule in this
21 January-February 2015 timeframe?

22 A. That is when they changed it, that we were not supposed to
23 be doing that anymore.

24 Q. How did you learn that you were not supposed to be doing
08:42 25 that anymore? Was there a memo that went out to all managers?

1 A. I'm sure there were emails that went out or communication
2 through The Wire.

3 Q. Am I right that you think the directive to stop the practice
4 of manually changing associates' schedules came from outside
08:43 5 your Manitowoc store?

6 A. Yes. That came from the home office.

7 Q. The home office in Bentonville, Arkansas?

8 A. Yes.

9 Q. Okay. To your knowledge, did managers, when they logged
08:43 10 into the Smart System, still have the capacity, like the
11 capability of manually changing the time that the system
12 generated for an associate?

13 A. Yes.

14 Q. Ms. Popp, do you recall when you first met Marlo Spaeth?

08:43 15 A. It would have been in 2010, when I was an assistant, first
16 moved to Manitowoc as an assistant.

17 Q. Do you recall whether you recognized, when you first met
18 her, that she has a disability?

19 A. Yes.

08:44 20 Q. And could you recognize what disability she had just from
21 the first time you saw her?

22 A. Yes.

23 Q. And, Ms. Popp, what disability did you think Marlo Spaeth
24 had?

08:44 25 A. My thought of what she had is Down syndrome.

1

* * *

2

MS. VANCE: That completes the deposition of Bonnie Popp.

4

THE COURT: Okay. Then this witness can be excused.

08:44

5

MS. VANCE: Thank you, Your Honor.

6

(Deposition read-in concluded at 8:44 a.m.)

7

THE COURT: Okay. Did you have something further, Mr. Harlan, at this point?

9

MR. HARLAN: No, sir.

08:44

10

THE COURT: Then the plaintiff may call their next witness.

11

12

MS. CARTER: The plaintiff calls Robin Castro adversely.

13

14

(Brief pause.)

08:47

15

THE COURT: I think we should have the witnesses more readily available.

16

17

MR. MULAIRE: It's their employee, Your Honor.

18

THE COURT: I understand.

19

ROBIN CASTRO, PLAINTIFF WITNESS, DULY SWORN

08:48

20

THE CLERK: Please state then spell your first and last name, please.

21

22

THE WITNESS: Robin Castro, R-o-b-i-n, C-a-s-t-r-o.

23

THE CLERK: Please be seated.

24

THE COURT: And you may proceed then, Ms. Carter.

08:48

25

MS. CARTER: Thank you, Your Honor.

DIRECT EXAMINATION

1

2

BY MS. CARTER:

3

Q. Good morning, Ms. Castro.

4

A. Good morning.

08:48

5

Q. Can you hear me okay?

6

A. Yes.

7

Q. We met once before at your deposition, but, just to

8

reintroduce myself, I'm Leslie Carter, one of the attorneys for

9

the EEOC. Okay?

08:48

10

And, Ms. Castro, in 2015, you were a comanager at the
Manitowoc Walmart store; right?

12

A. Correct.

13

Q. And that's the same store where Marlo Spaeth worked.

14

A. Correct.

08:49

15

Q. You first began working for Walmart in 2006; right?

16

A. That's correct.

17

Q. And you've continuously been employed with Walmart from 2006
to the present; right? Correct?

19

A. Yes.

08:49

20

THE COURT: Ms. Castro, would you pull the microphone
a little closer to you or pull yourself closer to the
microphone? Thank you.

23

MS. CARTER: Let us know if the problem continues.

24

Okay, thank you.

08:49

25

BY MS. CARTER:

1 Q. So you've continuously been employed with Walmart from 2006
2 to the present; right?

3 A. Yes.

4 Q. Okay. And so you've worked for Walmart for about 15 years.

08:49 5 A. Yes.

6 Q. And over the past 15 years you've held a number of different
7 positions at Walmart.

8 A. That's correct.

9 Q. In 2010 you were a zone merchandise supervisor; right?

08:49 10 A. Yes.

11 Q. In the home lines department?

12 A. Yes.

13 Q. And shortly after you became the zone merchandise supervisor
14 Walmart promoted you again; right?

08:50 15 A. That's correct.

16 Q. You were promoted to assistant manager of the store.

17 A. That's correct.

18 Q. And by 2014 you were a comanager of the Walmart Super Store
19 in Manitowoc; right?

08:50 20 A. Yes.

21 Q. The store where Marlo Spaeth worked.

22 A. Yes.

23 Q. Okay, Ms. Castro. I'd like to ask you a few questions about
24 when you worked with Marlo Spaeth.

08:50 25 A. Okay.

1 Q. So you told us a few minutes ago that in 2010 you were a
2 zone merchandise supervisor in the home lines department.

3 A. Yes.

4 Q. And Marlo Spaeth worked in home lines; right?

08:50 5 A. Yes.

6 Q. So you worked directly with Marlo when you were the zone
7 merchandise supervisor in the home lines department.

8 A. Yes.

9 Q. And that was the first time you worked directly with Marlo;
08:51 10 right?

11 A. That's correct.

12 Q. You knew Marlo had a mental impairment; right?

13 A. Yes.

14 Q. In fact, you knew she had Down syndrome.

08:51 15 A. Yes.

16 Q. And you knew Marlo had Down syndrome because you asked Karen
17 Becker.

18 A. Yes.

19 Q. The personnel coordinator for the Walmart store.

08:51 20 A. Yes.

21 Q. And in 2015, when you were comanager of the Manitowoc
22 Walmart store, you were still aware that Marlo had Down
23 syndrome; right?

24 A. Yes.

08:51 25 Q. Now, let's talk about Marlo's performance at work.

1 A. Okay.

2 Q. Isn't it true that, in all your time as a manager, Marlo
3 didn't have performance issues that you were aware of?

4 A. That's correct.

08:52 5 Q. Okay, Ms. Castro. I'd like to ask you some questions about
6 Walmart's scheduling system.

7 A. Okay.

8 Q. At some point in 2014, the Manitowoc Walmart store switched
9 to a new computer based scheduling system; right?

08:52 10 A. That's correct.

11 Q. The schedules were done weekly; correct?

12 A. Yes.

13 Q. And a Walmart associate could use time off if they asked to
14 leave a shift early before the weekly schedule was set; right?

08:52 15 A. Yes.

16 Q. And before the weekly schedule was set an associate could
17 choose whether they wanted to use paid time off or unpaid time
18 off; right?

19 A. Yes.

08:53 20 Q. So if an associate was out of paid time off they could still
21 use unpaid time off, couldn't they?

22 A. Yes.

23 Q. And isn't it true that there was no limit on unpaid time
24 off?

08:53 25 A. That's correct.

1 Q. An employee just wouldn't get paid for the hours they didn't
2 work; right?

3 A. That's correct.

4 Q. So, if an associate requested unpaid time off every Monday
08:53 5 after 4 p.m., they'd still get scheduled for a partial shift;
6 correct?

7 A. Can you explain that again, please?

8 Q. If an associate requested unpaid time off every Monday after
9 4 p.m., they could still get scheduled for a partial shift;
08:53 10 right?

11 A. They could, depending on their availability.

12 Q. And if the unpaid time off was requested before the weekly
13 schedule was done, it would not count as an absence; correct?

14 A. Correct.

08:54 15 Q. Now, would you agree that blocking off unpaid time in a
16 person's schedule like this was a simple step that Walmart could
17 do in the matter of minutes, wasn't it?

18 A. Can you re-explain that again, please?

19 Q. Blocking off unpaid time off in a person's schedule like
08:54 20 this was a simple step that Walmart could do in a matter of
21 minutes; right?

22 A. Yes.

23 Q. Okay, Ms. Castro. I'd like to ask you some questions about
24 Walmart's guidelines and policies.

08:55 25 A. Okay.

1 Q. When you became a member of management at Walmart you had
2 online training regarding discrimination in the workplace;
3 right?

4 A. That's correct.

08:55 5 Q. Ms. Castro, please turn to Plaintiff's Exhibit 30 in your
6 exhibit binder. It's to your right.

7 (Exhibit 30, Accommodation Management Guidelines -
8 D000984-989, admitted previously by stipulation.)

9 MS. CARTER: And, Lectrice, I'll let you know when I
08:55 10 need you to publish it.

11 BY MS. CARTER:

12 Q. Lectrice is our paralegal. So if you hear me talking to
13 her, she's handling the exhibits.

14 Exhibit 30, Ms. Castro, you're familiar with this
08:56 15 document; right?

16 A. Yes, I've seen it before.

17 Q. These are the Walmart accommodation in employment medical
18 related management guidelines; right?

19 A. Correct.

08:56 20 Q. Okay. And these accommodation guidelines were available to
21 members of management at the store where Marlo worked; right?

22 A. Yes.

23 Q. Yes?

24 A. Yes.

08:56 25 Q. Please, I know that sometimes you may know where I'm going,

1 but please allow me to finish the question before you answer,
2 okay? Okay.

3 In fact, these management guidelines were available to
4 all managers at Walmart; right?

08:56 5 A. Yes.

6 Q. Okay. I'd like to direct your attention to the dates in the
7 upper left corner of Exhibit 30. Do you see the dates?

8 A. Yes.

9 Q. And these were the management -- the Walmart accommodation
08:57 10 and employment medical related management guidelines that were
11 in place at Walmart until August 13, 2015; right?

12 A. Yes.

13 Q. Okay. And Marlo Spaeth's July 2015 termination fell within
14 those dates, didn't it?

08:57 15 A. Yes.

16 Q. Okay.

17 MS. CARTER: Lectrice, can you please publish
18 Exhibit 30 to the jury? Thank you.

19 BY MS. CARTER:

08:57 20 Q. So, Ms. Castro, you can look to your right, there's a
21 screen? If it's easier for you to read. But you can work with
22 the paper if you prefer. Yeah, okay.

23 So, Ms. Castro, these guidelines were available to you
24 as the comanager of the Manitowoc Walmart store.

08:57 25 A. Yes.

1 Q. And these management guidelines applied to all managers and
2 supervisors who worked at Walmart.

3 A. Yes.

4 Q. And as a manager you were supposed to follow any company
08:58 5 policy or guideline; right?

6 A. Yes.

7 Q. Right?

8 A. Yes.

9 Q. Now, if you look at the middle of the first page, do you see
08:58 10 the heading that says "Identifying a Request For Job
11 Assistance"?

12 A. Yes.

13 MS. CARTER: Lectrice, can you please call out the
14 section of the document that has the heading "Identifying
08:58 15 Request For Job Assistance"?

16 BY MS. CARTER:

17 Q. Ms. Castro, right below the heading it says, "An associate
18 may request job assistance in a variety of ways." Right?

19 A. Yes.

08:59 20 MS. CARTER: Lectrice, can you highlight that if you
21 can see it? It's in the first line. If not, it's okay. All
22 right.

23 BY MS. CARTER:

24 Q. You can see it, Ms. Castro, right?

08:59 25 A. Yes.

1 Q. And she can make a request directly, right? An associate
2 could?

3 A. Yes.

4 MS. CARTER: Lectrice, could you zoom in on that if
08:59 5 possible? And we'll just scroll down.

6 BY MS. CARTER:

7 Q. Now, Ms. Castro, so the guidelines say that an associate
8 could make a request directly; right?

9 A. Yes.

09:00 10 Q. And they also say that a family member could make the
11 request; right?

12 A. Yes.

13 Q. And the guidelines there don't say anything about a request
14 needing to come from a legal guardian, do they?

09:00 15 A. They do not.

16 Q. And they don't say anything about needing guardianship
17 paperwork.

18 A. That's correct.

19 Q. Okay.

09:00 20 MS. CARTER: So, Lectrice, if you can put that callout
21 away and pull out on the full paragraph so we can see it more
22 clearly. We're still under the Identifying a Request For Job
23 Assistance.

24 We'll give her a few minutes. Technology.

09:01 25 (Brief pause.)

1 MS. CARTER: Lectrice, if you could go to the first
2 page of Exhibit 30. The first callout that you had under
3 Exhibit 30. No, the one before that, please. Just zoom in on
4 the Identifying Request For Job Assistance. The second
09:01 5 paragraph in the guidelines, please. Okay.

6 BY MS. CARTER:

7 Q. So, Ms. Castro, we've covered the "an associate may request
8 job assistance herself directly;" is that right?

9 A. Yes.

09:02 10 Q. And a family member could request job assistance or an
11 accommodation; right?

12 A. Yes.

13 Q. And the policy also says that any other person, like a
14 friend, anyone, could make a request on an associate's behalf;
09:02 15 right?

16 A. Yes.

17 Q. And the request could be made verbally; right? Orally.

18 A. Correct.

19 Q. It didn't have to be in writing.

09:02 20 A. Correct.

21 Q. And the request didn't need to include the word
22 "reasonable;" right?

23 A. Correct.

24 Q. And it didn't need to include the word "accommodation;"
09:02 25 correct?

1 A. Correct.

2 Q. And then the management guidelines tell you -- actually, can
3 you read the sentence that starts with "if an associate tells
4 you that she is having"?

09:03 5 A. "If an associate tells you that she or he is having trouble
6 doing his or her job because she or he is unable to refine
7 print, consider that a request for job assistance. Likewise, if
8 the associate calls you to say that the associate will be
9 returning to work but may need help due to a broken foot,
09:03 10 consider that a request for job assistance."

11 Q. Okay, thank you, Ms. Castro. Now, Ms. Castro, as the
12 comanager of the Walmart store, you knew it was illegal to
13 discriminate against employees with disabilities; right?

14 A. That's correct.

09:04 15 Q. And as the comanager, you also knew that the law requires
16 making reasonable accommodations for employees with
17 disabilities; right?

18 A. Yes.

19 Q. Ms. Castro, Walmart's management guidelines say that medical
09:04 20 information is not necessary if the associate has a known or
21 easily observable disability, don't they?

22 A. Correct.

23 Q. Okay. And an associate could ask any member of management
24 at Walmart for a disability accommodation, couldn't they?

09:04 25 A. Yes.

1 Q. And all members of management were able to provide an
2 associate with an accommodation packet; correct?

3 A. Yes, we could.

4 Q. And if you look at the right column on these guidelines, do
09:05 5 you see where it says "printed materials, reasonable
6 accommodation packet"?

7 A. Yes.

8 MS. CARTER: Lectrice, could you go to the first page
9 of the document itself and just zoom in on the right column, if
09:05 10 that's possible.

11 (Brief pause.)

12 BY MS. CARTER:

13 Q. So on that right column there are a couple of links. The
14 print is very small, but we might be able to zoom in.

09:06 15 MS. CARTER: Okay. Thank you, Lectrice.

16 BY MS. CARTER:

17 Q. And right below "coaching for improvement" you see "printed
18 materials," and then it says "reasonable accommodation packet"
19 and "reasonable accommodation form." Right?

09:06 20 A. Yes.

21 Q. And so this link is a link that any member of management
22 could use to print a reasonable accommodation packet.

23 A. Yes.

24 Q. Okay. And the link to print a reasonable accommodation
09:06 25 packet is right below the link a manager needed to click to

1 access the coaching for improvement plan form, isn't it?

2 A. Yes.

3 Q. Ms. Castro, the management guidelines say that requests for
4 schedule accommodations could be approved at the store level;
09:07 5 right?

6 A. Not as far as I knew at the time.

7 Q. If you go to the next page of this document, page 2. They
8 list requests that can be approved in store as JAs, which JAs
9 are job assistance; right?

09:07 10 A. Correct.

11 Q. And do you see the paragraph that says, "Scheduling. Minor
12 changes to availability and scheduling preferences can be
13 approved in store."

14 A. Correct.

09:08 15 Q. Does that refresh your recollection that the management
16 guidelines say that requests for scheduling accommodations could
17 be approved at the store level?

18 A. Yes, but it doesn't guarantee hours.

19 Q. That wasn't my question. Just requests for schedule
09:08 20 accommodations.

21 A. Yes.

22 Q. And in the next section on page 2, the part that says,
23 "Requests that cannot be approved as facility JAs," do you see
24 that, job assistance? The guidelines state that "If an
09:08 25 associate requests job assistance that cannot or has not been

1 approved at the store level, the request must be forwarded to
2 the Accommodations Services Center," the ASC; is that correct?

3 A. Yes.

4 Q. And, in fact, the manager guidelines instruct the
09:09 5 accommodation packet was to be provided as soon as possible,
6 wasn't it?

7 A. Yes.

8 Q. And in no event more than two days after the request;
9 correct?

09:09 10 A. Correct.

11 MS. CARTER: Lectrice, you can take Exhibit 30 down.
12 Thank you.

13 BY MS. CARTER:

14 Q. Marlo Spaeth, she asked for a set schedule, didn't she?

09:09 15 A. Yes.

16 Q. Her noon to 4:00 schedule.

17 A. Correct.

18 Q. And her request to go back to a noon to 4:00 schedule was
19 not approved at the store level.

09:09 20 A. That is correct.

21 Q. So according to the management guidelines her request for a
22 set noon to 4:00 schedule had to be forwarded to the
23 Accommodations Service Center, didn't it?

24 A. That's correct.

09:10 25 Q. But you didn't provide Marlo Spaeth or any member of her

1 family with a request for accommodation packet, did you?

2 A. I did not.

3 Q. And you're not aware of anyone else at Walmart ever
4 providing Marlo Spaeth or any member of her family with an
09:10 5 accommodation packet either.

6 A. That's correct.

7 Q. And you didn't forward Marlo's request for a set noon to
8 4:00 schedule to the Accommodation Services Center.

9 A. I did not.

09:10 10 Q. And you're not aware of anyone else at Walmart forwarding
11 Marlo Spaeth's request --

12 A. I am not.

13 Q. Can I finish? Let me finish my question. You're not aware
14 of anyone else at Walmart forwarding Marlo Spaeth's request for
09:10 15 a set noon to 4:00 schedule to the Accommodation Services
16 Center?

17 A. No.

18 Q. And isn't it true that even for accommodation requests that
19 can't be approved as job assistance at the store level, if the
09:11 20 associate's disability or medical condition is known or
21 otherwise obvious, the Accommodation Service Center may not even
22 need to request medical information?

23 A. That I'm not aware of.

24 Q. If you take a look at page 2 of Exhibit 30, you can read
09:11 25 through to refresh your recollection. It's under the section

1 that says "ASC will obtain additional medical information if
2 necessary." And it's the first line.

3 A. Then, yes.

4 Q. So just to be clear I'll ask the question again.

09:11 5 So, Ms. Castro, isn't it true that even for
6 accommodation requests that can't be approved as job assistance
7 at the store level, if the associate's disability or medical
8 condition is known or otherwise obvious the Accommodation
9 Services Center may not even need to request medical
09:12 10 information?

11 A. That is correct.

12 Q. Okay, Ms. Castro. Now I would like to ask you some
13 questions about Marlo's schedule. Okay?

14 A. Okay.

09:12 15 Q. So sometime in 2014 the store switched to this computer
16 generated scheduling; right?

17 A. Correct.

18 Q. And the switch to computer generated scheduling resulted in
19 a change to Marlo Spaeth's schedule.

09:12 20 A. Correct.

21 Q. You told us a few minutes ago that her schedule was noon to
22 4:00 p.m., before the change.

23 A. Correct.

24 Q. And it was changed to 1 p.m. to 5:30 p.m.?

09:13 25 A. Yes.

1 Q. And after Marlo's schedule changed you noticed that she
2 wasn't doing well with the new schedule, didn't you?

3 A. Correct.

4 Q. She was still clocking in early, wasn't she?

09:13 5 A. Yes.

6 Q. And she was still leaving around the same time she used to
7 leave before the schedule change; right?

8 A. I don't recall offhand.

9 Q. But she was still leaving before 5:30.

09:13 10 A. Correct.

11 Q. Closer to 4 p.m.

12 A. That I don't recall.

13 Q. But before 5:30.

14 A. Correct.

09:13 15 Q. So at some point you asked her why she was leaving early;
16 right?

17 A. Correct.

18 Q. And Marlo told you that she was afraid to miss the bus,
19 didn't she?

09:13 20 A. Yes.

21 Q. She was afraid to miss the bus she normally took; right?

22 A. She just said "miss the bus."

23 Q. And in January 2015, you and assistant manager Julia Stern
24 had a meeting with Marlo; right?

09:14 25 A. Correct.

1 Q. And in that meeting Marlo asked you and Julia Stern if she
2 could go back to her noon to 4:00 schedule, didn't she?

3 A. Yes.

4 Q. That was a request for a schedule accommodation, wasn't it?

09:14 5 A. According to the policy, yes.

6 Q. But you didn't give Marlo her old schedule back, did you?

7 A. I did not.

8 Q. Now, you told us a few minutes ago that it would have taken
9 just a few minutes to block off unpaid time for an associate

09:15 10 after 4 p.m. in their weekly schedule; right?

11 A. When it's requested, yes.

12 Q. Okay. And that if you made that change to the schedule
13 before the schedule is set, then the early departures would not
14 result in attendance violations; is that correct?

09:15 15 A. Correct.

16 Q. But you didn't take five minutes to enter unpaid off after
17 5 p.m. into Marlo's schedule, did you?

18 A. I did not.

19 Q. Okay. Let's fast-forward about six months to July 2015.

09:15 20 Okay?

21 A. Yup.

22 Q. You were at the meeting where Marlo Spaeth was fired; right?

23 A. Yes.

24 Q. And Julia Stern was there?

09:15 25 A. Yes.

1 Q. And Debbie Moss was at the termination meeting too; right?

2 A. At the end.

3 Q. At the end.

4 A. Yes.

09:16 5 Q. And what was Debbie Moss's title?

6 A. At the time, training coordinator.

7 Q. And Julie Stern was an assistant manager at the store.

8 A. Yes.

9 Q. Marlo Spaeth's supervisor.

09:16 10 A. Yes.

11 Q. And in the meeting where she got fired, Marlo didn't talk at
12 all during that meeting, did she?

13 A. She did not.

14 Q. She just looked down at the table.

09:16 15 A. Right.

16 Q. And she hid her face in her hand, didn't she?

17 A. I don't recall that.

18 Q. But she was looking down.

19 A. Correct.

09:16 20 Q. And she didn't speak.

21 A. That's correct.

22 Q. Okay.

23 THE COURT: Do you want some water?

24 THE WITNESS: Yes, please.

09:17 25 (Brief pause.)

1 BY MS. CARTER:

2 Q. Do you remember that Marlo didn't want to take her Walmart
3 vest off?

4 A. I do not recall that.

09:17 5 Q. You said that Debbie came in at the end. Do you remember
6 what prompted Debbie to come into the meeting?

7 A. I do not.

8 Q. Do you remember that Marlo was crying?

9 A. I do not recall that.

09:18 10 Q. Do you remember if Debbie was crying?

11 A. I do not recall that either.

12 Q. And then after Debbie came into the meeting she took Marlo
13 to her Walmart locker; right?

14 A. That's correct.

09:18 15 Q. And she had Marlo empty out her locker; right?

16 A. Correct.

17 Q. And then sent her home.

18 A. Correct.

19 Q. Let's talk about exit interview forms at Walmart, okay?

09:18 20 A. Excuse me. Can I take a cough drop? I have a cold.

21 Q. Yes.

22 (Brief pause.)

23 MS. CARTER: Lectrice, if you can prepare Exhibit 20,
24 but don't publish it yet.

09:19 25 BY MS. CARTER:

1 Q. So, Ms. Castro, when an associate is fired from Walmart, as
2 part of the regular practice the associate is given an exit
3 interview form; right?

4 A. Correct.

5 (Exhibit 20, Exit Interview - EEOC00745, admitted
6 previously by stipulation.)

7 BY MS. CARTER:

8 Q. And, Ms. Castro, can you turn to Exhibit 20 in your exhibit
9 folder. This is Marlo Spaeth's exit interview form; correct?

09:20 10 A. Correct.

11 MS. CARTER: Lectrice, please publish what's been
12 previously admitted as Exhibit 20 to the jury. Thank you.

13 BY MS. CARTER:

14 Q. Now, Ms. Castro, towards the bottom half of the page we can
09:20 15 see a part that says "witness name" and next to it it says
16 "Robin Castro;" right?

17 A. Correct.

18 Q. And that's your electronic signature there.

19 A. Yes.

09:20 20 Q. Okay. And above your name there is a section that says,
21 "Summary of Termination Information;" right?

22 A. Yes.

23 Q. And in the summary of termination information on Marlo
24 Spaeth's exit interview form it says that Marlo was
09:21 25 involuntarily terminated.

1 A. That's correct.

2 Q. And it also says that Marlo was eligible for rehire.

3 A. Correct.

09:21 4 Q. And eligibility for rehire, that's determined based on the
5 reason for termination; right?

6 A. Correct.

7 Q. And Walmart has an actual policy, a rehire and reinstatement
8 policy for former associates; correct?

9 A. Correct.

09:21 10 MS. CARTER: Lectrice, can you pull up Exhibit 26,
11 please.

12 (Exhibit 26, Rehire Policy from Deposition Exhibit
13 131, admitted previously by stipulation.)

14 BY MS. CARTER:

09:21 15 Q. And, Ms. Castro, please turn to Exhibit 26 in your binder.

16 Exhibit 26 was previously admitted by stipulation by
17 the parties.

18 Ms. Castro, this is Walmart's rehire/reinstatement of
19 former associates policy; right?

09:22 20 A. Right.

21 Q. I want to draw your attention to the section of the policy
22 that's entitled, "Eligibility For Rehire." Do you see that?

23 A. Yes.

24 Q. And in that section Walmart lists several reasons for
09:22 25 termination that would make an associate ineligible for rehire;

1 right?

2 A. Yes.

3 Q. Please review the categories of terminations that would make
4 an associate ineligible for rehire, Ms. Castro. Can you read
09:22 5 them for me?

6 A. "Intentional violation of the corporate HIPAA privacy
7 policy;" "gross misconduct - integrity issue;" "gross misconduct
8 - other;" "violation of the workplace standards policy;"
9 "relatives and romantic relationship partner" section; and
09:23 10 "falsification of employment documents."

11 Q. Thank you, Ms. Castro. And absenteeism is not one of the
12 termination reasons that would make an associate ineligible for
13 rehire; correct?

14 A. Correct.

09:23 15 Q. And, to your knowledge, Walmart has rehired other employees
16 who were terminated for attendance; right?

17 A. Yes.

18 Q. And this policy also includes a section on reinstatement;
19 correct?

09:23 20 A. Yes.

21 Q. And under Walmart's policy, reinstatement would restore an
22 associate's employment as if termination had not occurred;
23 correct?

24 A. Correct.

09:23 25 Q. And for the Manitowoc store, Marlo could have been

1 reinstated as if the termination had not occurred with the
2 approval of the market human resources manager; right?

3 A. Yes.

4 Q. And in this instance the market human resources manager was
09:24 5 Lee Spude; is that correct?

6 A. Yes.

7 Q. And if approval is given by the market human resources
8 manager, an employee can be reinstated by clicking the rehire
9 and reinstatement link; correct?

09:24 10 A. From what I understand, yes.

11 Q. Let's talk about the meeting with Marlo's sister, Amy Jo
12 Stevenson, in July 2015, after Marlo was terminated.

13 So, a few days after Walmart fired Marlo you met
14 Marlo's sister, Amy Jo Stevenson, in person; right?

09:24 15 A. Yes.

16 Q. She came to Walmart with Marlo's mom.

17 A. Yes.

18 Q. And Marlo was with her, too.

19 A. Yes.

09:25 20 Q. And Marlo's mom's name, that was Sandy Barnes? Sandra
21 Barnes?

22 A. Yes.

23 Q. Okay. And Karen Becker was at the meeting as well; correct?

24 A. Yes.

09:25 25 Q. Yes?

1 A. Yes.

2 Q. And at the time of the July 2015 meeting you were aware that
3 Marlo's mother, Sandra Barnes, used to be involved with Marlo's
4 employment; right?

09:25 5 A. Yes.

6 Q. And you were aware that Marlo's mother used to be involved
7 with Marlo's employment before the July 2015 meeting.

8 A. Yes.

9 Q. You heard Karen Becker talking to another manager about it,
09:25 10 about Sandra Barnes, didn't you?

11 A. Yes.

12 Q. And this conversation was occurring around the time of
13 Marlo's attendance issues; correct?

14 A. Yes.

09:26 15 Q. And Sandy Barnes came up because Marlo's attendance issues
16 were the sort of thing that would have been raised with Marlo's
17 mother in the past; right?

18 A. That I can't say. I don't know.

19 Q. But Sandra Barnes came up in the context of Marlo's
09:26 20 attendance issues and the fact that she used to be involved in
21 Marlo's employment.

22 A. Yes.

23 Q. Yes?

24 A. Yes.

09:26 25 Q. Okay. This was sometime in 2014 that you knew that Marlo's

1 mom, Sandra Barnes, used to be involved in Marlo's employment.
2 Sometime in late 2014.

3 A. Yes.

4 Q. Okay. And you also knew that Karen Becker had lost contact
09:27 5 with Marlo's mother because Sandra Barnes was in a nursing home.

6 A. Yes.

7 Q. And at the July 2015 meeting, after Marlo was fired, it was
8 your understanding that Marlo's sister, Amy Jo Stevenson, took
9 on the role of someone who was acting on Marlo's behalf, in
09:27 10 Marlo's interests; correct?

11 A. At that time, yes.

12 Q. So at the July 15 meeting it was your understanding that Amy
13 Jo Stevenson was someone who was acting in Marlo's interests.

14 A. Yes.

09:28 15 Q. Okay. And Amy Jo Stevenson asked why no one at Walmart had
16 contacted Marlo's mom; right?

17 A. Yes.

18 Q. Now, at that July 2015 meeting -- it was July 16th; right?
19 Does that sound --

09:28 20 A. Yes.

21 Q. Okay. At that July 16th, 2015 meeting, Amy Jo Stevenson
22 referred to the Americans With Disabilities Act, didn't she?

23 A. Yes.

24 Q. And in that same meeting where Amy Jo referred to the ADA,
09:28 25 the Americans With Disabilities Act, Amy Jo asked for Marlo to

1 be rehired; right?

2 A. Correct.

3 Q. And in the same meeting where Amy Jo referred to the
4 Americans With Disabilities Act, Amy Jo asked for Marlo to be
09:29 5 given her old schedule back, didn't she?

6 A. I don't recall that offhand.

7 Q. But she did refer to the ADA.

8 A. Yes.

9 Q. With regard to Marlo's schedule.

09:29 10 A. Yes.

11 Q. Okay. Let's talk about what happened after that meeting
12 with Amy Jo Stevenson.

13 After the July 16th, 2015 meeting with Amy Jo
14 Stevenson, you emailed the market human resources manager, Lee
09:29 15 Spude, to tell him what happened; right?

16 A. I can't recall if it was a email or phone call.

17 Q. Did you do both?

18 A. I don't recall which it was.

19 Q. Okay.

09:29 20 MS. CARTER: Lectrice, can you pull up Exhibit 34?

21 Okay.

22 (Exhibit 34, Email exchange Spude and Castro -
23 D001961, admitted previously by stipulation.)

24 BY MS. CARTER:

09:30 25 Q. And, Ms. Castro, you can take a look at Exhibit 34 to

1 refresh your recollection as well.

2 A. (Witness peruses document.)

3 Q. So I'll ask again. After the July 16th meeting with Amy Jo
4 Stevenson, you emailed the market human resources manager, Lee
09:30 5 Spude, to tell him what happened; right?

6 A. Yes.

7 Q. And Lee Spude knew that Marlo's rights under the ADA were
8 discussed at that meeting; right?

9 A. Yes.

09:30 10 Q. He knew that because you told him; right?

11 A. Correct.

12 Q. Now, Ms. Castro, in your email you told Lee Spude that
13 Marlo's sister and mom had asked you to give Marlo her job back;
14 right?

09:31 15 A. Yes.

16 MS. CARTER: Lectrice, if you could call out the
17 bottom of Exhibit 34, the email at the bottom part of the page.
18 Thank you.

19 BY MS. CARTER:

09:31 20 Q. And you also told Lee Spude that Marlo's sister said,
21 "According to the ADA act, Walmart should have changed Marlo's
22 schedule when Marlo asked." Right?

23 A. Yes.

24 Q. So it's fair to say that Lee Spude knew that Marlo's legal
09:31 25 rights under the ADA were at issue; correct?

1 A. Yes.

2 Q. And, in fact, Mr. Spude told you to contact Walmart's legal
3 department, didn't he?

4 A. Yes.

09:32 5 Q. I'd like to draw your attention to the center of the page.

6 MS. CARTER: Thank you, Lectrice. You can put that
7 away. And if you can reopen Exhibit 34 and then zoom in on the
8 email in the middle of the page, Lectrice.

9 In the meantime we can discuss it. Yeah, right in the
09:32 10 middle. Thank you. With a callout.

11 BY MS. CARTER:

12 Q. So, Ms. Castro, I'd like to draw your attention to the email
13 from Friday, July 17, 2015 from 4:30 p.m. Do you see that?

14 A. Yes.

09:32 15 Q. And this is where, in response to your email, the market
16 human resources manager, Lee Spude, told you to call legal
17 hotline; right?

18 A. Correct.

19 Q. And he specifically told you also not to have any further
09:33 20 discussions with Marlo's relatives, didn't he?

21 A. Yes.

22 Q. But you told us a few moments ago that Walmart's management
23 guidelines say that you can talk to family members about
24 disability accommodations, don't they?

09:33 25 A. Yes.

1 Q. But you followed the orders that you were given from the
2 market human resources manager, didn't you?

3 A. Yes.

4 Q. And you stopped communicating with Marlo's relatives.

09:33 5 A. Correct.

6 Q. And you also followed his instruction to call the legal
7 hotline; right?

8 A. Yes.

9 Q. You called Walmart's legal hotline and reported that there
09:33 10 had been an allegation of disability discrimination; right?

11 A. I did not.

12 Q. You did not?

13 A. I did not. I reported a threat.

14 Q. You reported a threat?

09:34 15 A. Correct.

16 Q. A threat of what?

17 A. That she was going to take further action if we did not
18 abide by the ADA act.

19 Q. And the ADA act that deals with disability discrimination;
09:34 20 right?

21 A. Yes.

22 Q. Okay. And so you called the legal hotline and reported that
23 there had been an allegation of disability discrimination under
24 the ADA; right?

09:34 25 A. With a threat to have legal action, yes.

1 Q. Because of a violation of the ADA; correct?

2 A. Yes.

3 Q. Okay.

4 MS. CARTER: Lectrice, can you please pull up Exhibit

09:34 5 32 for us.

6 (Exhibit 32, Case Details - D001014-1019 - Morgan Dep.

7 100, admitted previously by stipulation.)

8 BY MS. CARTER:

9 Q. And, Ms. Castro, if you can turn to Exhibit 32. So, in

09:34 10 Exhibit 32, in the middle of the page, this is -- these are case

11 details, a summary of an investigation that was opened after

12 your call; correct?

13 A. Yes.

14 Q. And in the middle of the page it says "parties involved."

09:35 15 Do you see that?

16 A. Yes, I do.

17 Q. And right below "parties involved" it's lists your name,

18 Robin Castro.

19 A. Yes.

09:35 20 Q. And under "party type" it says you were the caller.

21 A. Correct.

22 Q. And Exhibit 32 is the record of your call to the legal

23 hotline after the meeting with Amy Jo Stevenson.

24 A. Yes.

09:35 25 Q. And so Walmart opened an investigation about Amy's

1 allegations regarding Marlo's termination after your call to
2 legal hotline; right?

3 A. Yes.

09:35 4 Q. But Marlo's request for a schedule accommodation was still
5 denied.

6 A. Correct.

7 Q. Okay. Let's talk about Exhibit 35. You can turn to
8 Exhibit 35 in your binder.

9 (Exhibit 35, Castro Reports to Investigator -
09:36 10 D001081-1084, D1195-1099, admitted previously by stipulation.)

11 MS. CARTER: Lectrice, if you can pull up page 5 of
12 Exhibit 35 which has been previously marked and previously
13 admitted by stipulation of the parties.

14 BY MS. CARTER:

09:36 15 Q. And, Ms. Castro, let me know when you're at page 5. Are you
16 ready?

17 A. I think so, yeah.

18 Q. Yes?

19 A. Yes.

09:36 20 Q. Ms. Castro, on the fifth page of Exhibit 35, these are notes
21 of an interview that you had with the store manager, Kent Abitz,
22 aren't they?

23 A. Yes.

24 MS. CARTER: Lectrice, do you have Exhibit 35?

09:37 25 Page 5, please.

1 (Brief pause.)

2 MS. CARTER: If you can go directly to page 5?

3 Thank you. We'll wait a minute.

4 (Brief pause.)

09:37 5 BY MS. CARTER:

6 Q. Okay. So these are notes from an interview --

7 MS. CARTER: It's right. Yeah.

8 BY MS. CARTER:

9 Q. So these are notes from an interview that you gave to Kent
09:37 10 Abitz, the then store manager; right?

11 A. Yes.

12 Q. And it was in connection with the investigation that
13 occurred after your call to the legal hotline.

14 A. Yes.

09:38 15 Q. Okay. And in these notes you can see an "R" on the left
16 column and a "K" on the left column; right?

17 A. Yes.

18 Q. And the "K" in the left column stands for a question being
19 asked by manager Kent Abitz; right?

09:38 20 A. Yes.

21 Q. And the "R" on the left side of the page indicates answers
22 that were provided by you.

23 A. Yes.

24 Q. Robin Castro.

09:38 25 A. Yes.

1 Q. Okay. So if you look at your responses to Mr. Abitz's
2 questions, it confirms that you were involved in the decision to
3 terminate Marlo Spaeth; correct?

4 A. I had knowledge of it, yes.

09:39 5 Q. If you turn to page 5 of your -- of the interview with Kent
6 Abitz, there is a question that says, from Kent, "Kay, were you
7 involved in the decision to term Marlo?" Do you see that?

8 A. Yes.

9 Q. And what was your answer?

09:39 10 A. Yes.

11 Q. Okay.

12 MS. CARTER: Lectrice, if you could --

13 Thank you. Yes. At the bottom of this page. "Were
14 you involved in the decision to term Marlo?" Thank you.

09:39 15 BY MS. CARTER:

16 Q. And then he asked, "Was your opinion asked?" Right, Robin?
17 He asked you, "Was your opinion asked?"

18 A. Yes.

19 Q. And what was your response?

09:39 20 A. No. Only the absences.

21 Q. No, the -- was your opinion asked?

22 A. Yes.

23 Q. And what was your response?

24 A. I responded yes.

09:40 25 Q. Okay. And you were asked your opinion of whether Marlo

1 Spaeth should be fired; right? That's what your opinion was
2 about, whether Marlo Spaeth should be fired; right?

3 A. Yes.

4 Q. And you did say yes, but you made sure to say that the
09:40 5 termination decision was not based on Marlo's job performance;
6 right?

7 A. Correct.

8 Q. Because Marlo's job performance was fine.

9 A. Correct.

09:40 10 Q. But you didn't make the decision to fire Marlo Spaeth on
11 your own, did you?

12 A. I did not.

13 Q. Walmart's market human resources manager, Lee Spude, signed
14 off on the decision to fire Marlo.

09:40 15 A. Yes.

16 Q. And in your interview with Kent Abitz, you told him the MHRM
17 Lee advised termination; is that correct?

18 A. Yes.

19 Q. To be clear, your opinion was that Marlo should be fired;
09:41 20 right?

21 A. Correct.

22 Q. But you told Kent Abitz that Amy Jo said you should have
23 accommodated Marlo with her schedule due to ADA rules, didn't
24 you?

09:41 25 A. Those were not my exact words, but, yes.

1 MS. CARTER: Lectrice, if you can go to -- --

2 BY MS. CARTER:

3 Q. Or, Robin, you can turn to the next page of the interview
4 and refresh your recollection, and then I'll ask you the
09:42 5 question again. Okay?

6 You told Kent Abitz that Amy Jo said you should have
7 accommodated Marlo with her schedule due to ADA rules; right?

8 A. Yes.

9 Q. And, Ms. Castro, isn't it true that you knew full well that
09:42 10 Walmart had an obligation under the ADA to provide scheduling
11 accommodations? Right?

12 MR. BURNETT: Your Honor, I object. This is a
13 question that calls for a legal conclusion that belongs to the
14 court what the obligation was.

09:42 15 THE COURT: I'm going to sustain the objection.

16 MS. CARTER: I'll restate it.

17 THE COURT: Okay.

18 BY MS. CARTER:

19 Q. Ms. Castro, was it's your belief that Walmart had an
09:43 20 obligation under the ADA to accommodate Ms. Spaeth's scheduling
21 needs?

22 MR. BURNETT: Same objection. That's irrelevant.

23 THE COURT: Come forward. Actually, let's take our
24 morning break.

09:43 25 Ladies and gentlemen, we're going to take our morning

1 break and resolve this issue and then bring you back.

2 (Jury out at 9:43 a.m.)

3 THE COURT: Okay. You can be seated.

4 So, Mr. Burnett, explain your objection.

09:43 5 MR. BURNETT: My objection, Your Honor, is this
6 question asks whether this witness's opinion of what the ADA
7 required of Walmart, whether her opinion is correct or incorrect
8 doesn't matter; it is what the Court tells the jury. So it's a
9 relevancy objection and it's a 403 objection.

09:44 10 THE COURT: Okay.

11 MS. CARTER: Your Honor, would you like our response?

12 THE COURT: Yes, Ms. Carter.

13 MS. CARTER: Okay. Ms. Castro was one of the
14 decisionmakers. She testified that she was familiar with the
09:44 15 ADA and that she knew the ADA required accommodations. Schedule
16 accommodations were one of them. It goes to reckless disregard,
17 Your Honor.

18 THE COURT: I think it's relevant for the purpose
19 Ms. Carter says. The EEOC is arguing that Walmart intentionally
09:44 20 and recklessly disregarded or violated rules that it knew it was
21 obligated to meet.

22 Now, Mr. Burnett is correct that Ms. Castro, as
23 knowledgeable as she is, is not the expert on this. So I think
24 a curative instruction or a limiting instruction would be
09:45 25 appropriate to advise the jury that ultimately, you know, the

1 legal question of whether or not -- or even the factual question
2 whether under the circumstances of this case Walmart had an
3 obligation to provide an accommodation is an issue that will be
4 decided in this case. But if her testimony is that she believed
09:45 5 it at the time, that's relevant to, it seems to me, what EEOC is
6 claiming Walmart's understanding was. So I think in that
7 respect it would be admissible. Mr. Burnett?

8 MR. BURNETT: Yes, Your Honor. On cross then I think
9 I'm entitled to ask the question "Did you believe Walmart was in
09:45 10 violation of the ADA for the way it treated Marlo Spaeth?"

11 THE COURT: Certainly. I mean, that's the adverse --
12 the converse of the question.

13 And I think, you know, from what I hear this witness
14 saying, she says, yes, of course, you have to accommodate a
09:46 15 person with a disability. Now, I don't know if she recognized
16 Marlo Spaeth had a disability. I mean, these are things that
17 the jury ultimately will be deciding.

18 MS. CARTER: Your Honor, can we have the witness
19 excused?

09:46 20 THE COURT: Sure. Ms. Castro, do you want to wait
21 outside just for a moment?

22 MS. CARTER: Thank you, Your Honor. Sorry for
23 interrupting you.

24 THE COURT: That's all right. I understand now that
09:46 25 I'm getting attuned to it all. You guys are immersed in it.

1 It seems to me that an issue that is being vigorously
2 disputed and one that the jury will ultimately decide is whether
3 there was enough information for Walmart to realize that this is
4 an ADA case; that what was being asked for in a schedule change
09:47 5 was actually a reasonable accommodation for a person with a
6 disability.

7 I understand Walmart's claim is, no, we didn't know
8 it. We knew she had a disability, we knew she didn't like her
9 new schedule, but we didn't know there was a claim that she
09:47 10 couldn't meet that schedule or comply with that schedule because
11 of her disability.

12 And I think that's ultimately what a jury is --
13 somehow the questions we present to the jury will, you know, get
14 to that. The jury will be asked, it seems to me, did Walmart
09:47 15 know that there was a need for a reasonable accommodation, or
16 were they aware that Ms. Spaeth needed an accommodation.

17 And I think this -- you know, to the extent this
18 question is tied to Ms. Spaeth, you know, whatever her answer
19 is, that's her answer.

09:47 20 But I think I can give a limiting instruction that
21 will protect against what Mr. Burnett legitimately fears which
22 is that the jury will accept that as a statement of the law or a
23 legal conclusion and, therefore, their job's done, Ms. Castro
24 has decided that they violated the law. And that's not proper
09:48 25 either.

1 Do you want to put together during the break,
2 Mr. Burnett, a limiting instruction?

3 MR. BURNETT: Sure.

4 THE COURT: If you have something in mind I'll give it
09:48 5 right away. And I think it's probably the kind of issue that we
6 probably should do a limiting instruction immediately.

7 Mr. Harlan?

8 MR. HARLAN: Your Honor, we've sat through a morning
9 of extensive questioning about guidelines, and we have submitted
09:48 10 a limiting instruction about helping the jury understand that
11 their task is to decide whether the ADA was violated, not
12 whether Walmart's internal policies, training manuals or
13 whatever was violated. Those are two different issues.

14 And obviously in this situation Walmart has set the
09:49 15 bar so that the employees don't get anywhere near violating the
16 ADA. So there's no -- the ADA and the guidelines are not
17 co-extensive. So I believe that we have to make the jury aware
18 of that given the line of questioning that we heard this
19 morning.

09:49 20 THE COURT: Well, why don't you and Mr. Burnett put
21 together a proposed instruction, run it by counsel for the EEOC,
22 and, you know, either give what you can agree on, or, if you
23 can't, I'll make a determination when I get back.

24 But let's take our break and maybe a little longer, I
09:49 25 hate to go too long, but 15 minutes if that will work. Okay?

1 MS. CARTER: Thank you, Your Honor.

2 THE COURT: We're in recess.

3 (Recess taken at 9:49 a.m., until 10:12 a.m.)

4 THE COURT: Go ahead, be seated.

10:12 5 First on the limiting instruction, I submitted
6 something. I realize you don't have printers at your disposal.

7 MR. MULAIRE: The instruction that your clerk provided
8 to us looks fine to us, Your Honor.

9 THE COURT: Any objection?

10:12 10 MR. HARLAN: Likewise from Walmart.

11 THE COURT: Okay. I'll go ahead and give that when we
12 bring the jury in. I understand the next witness is Marlo
13 Spaeth?

14 MS. VANCE: Yes, Your Honor.

10:13 15 MS. CARTER: The next live witness. We may do dep
16 designations right after this.

17 THE COURT: Would it make sense to resolve any issues
18 as to Marlo Spaeth before we bring the jury back?

19 MS. CARTER: Yes, Your Honor. I think that makes
10:13 20 sense. So we would ask your permission to have a little bit of
21 leeway on asking questions where the relevance may not be clear,
22 but it's just to get her comfortable.

23 THE COURT: Yeah. I think that makes sense. Yeah.

24 MS. CARTER: Thank you, Your Honor.

10:13 25 THE COURT: I think we all understand that the value

1 of this testimony isn't so much -- I'm not sure it's so much as
2 a -- that you're going to elicit factual information from her,
3 but I think it's nevertheless important because it will convey
4 to the jury, you know, her capacity, her understanding, and I
10:13 5 think help them understand in case in general. So I think it's
6 valuable regardless of the effectiveness of an oath or things
7 like that.

8 But I think the *Hanson* case is a pretty good
9 interpretation of the current state of the law. And I recognize
10:14 10 it's state court, but the Wisconsin Rules of Evidence, Rule 601,
11 or in Wisconsin nomenclature 90601, is identical. It seems to
12 me it just requires -- every witness -- every person is
13 competent to be a witness and then you administer the oath for
14 whatever value it might have.

10:14 15 MR. MULHAIRE: Your Honor, if I could just mention
16 briefly, I think that conclusion is right. We did a little bit
17 of research and under federal law, I mean, I don't know that
18 it's right to rely on state law per se because 601 is limited --
19 limits state law to claims where state law provides the rule of
10:14 20 decision. But I also found, and can just mention for the record
21 in case it's helpful, two Seventh Circuit cases that get you to
22 the same place I think. One is *U.S. vs. Banks*, 520 F.2d 627 at
23 page 630; the other is *U.S. v. Snyder*, 189 F.3d 640 at page 645.

24 And they basically say that "competency of a witness
10:15 25 to testify as distinguished from the issue of credibility is a

1 limited threshold decision for the trial judge as to whether a
2 proffered witness is capable of testifying in any meaningful
3 fashion whatsoever." That's a quote from *Banks*.

4 So I think it's -- what we discussed yesterday in
10:15 5 chambers is an accurate statement from the law from our point of
6 view, is that competency is an extremely low threshold and it
7 is, beyond that, largely up to the jury to evaluate what
8 significance to place on that testimony.

9 THE COURT: Okay. Well, let's bring the jury in then
10:15 10 and I'll give that instruction and then you'll continue with
11 your direct exam.

12 MS. CARTER: Thank you, Your Honor.

13 MS. VANCE: Your Honor, I'm going to take this moment
14 to make sure that Ms. Spaeth is outside and available?

10:16 15 THE COURT: Sure.

16 (Brief pause.)

17 (Jury in at 10:16 a.m.)

18 THE COURT: Okay. Go ahead and be seated, ladies and
19 gentlemen.

10:17 20 Before we continue the testimony, I'm going to give
21 what would be called a limiting or a cautionary instruction on
22 some of the testimony you are hearing and will hear. And this
23 is how it goes.

24 LIMITING/CAUTIONARY JURY INSTRUCTION

1 THE COURT: You have heard testimony by some
2 witnesses, including Walmart employees, concerning what they
3 believe the ADA required under the circumstances of this case.
4 Such testimony is relevant to determine why they took certain
10:17 5 actions and what their state of mind might be. But the question
6 of what the ADA requires is a legal question that the Court will
7 address in its instructions at the end of the case, and whether
8 Walmart violated the ADA is ultimately a question for you to
9 decide based on all the evidence in the case.

10:17 10 You have also heard testimony as to what Walmart's
11 action -- whether Walmart's actions complied with its own
12 internal policies and training. You should keep in mind that
13 Walmart's policies are not necessarily what the law requires.
14 The issue is ultimately whether Walmart violated the ADA, not
10:18 15 whether it violated its own internal policies and procedures.

16 So, with that understanding then we'll continue with
17 the direct examination of Ms. Castro.

18 MS. CARTER: Thank you, Your Honor.

19 THE COURT: Uh-huh.

10:18 20 BY MS. CARTER:

21 Q. Ms. Castro, before our break I asked you, isn't it true that
22 you believed that Walmart had an obligation under the ADA to
23 accommodate Ms. Spaeth's scheduling needs?

24 A. Could you clarify that?

10:18 25 THE COURT: You want the question read back?

1 THE WITNESS: Yeah.

2 THE COURT: I think it's pretty clear. Listen
3 carefully and we'll have the reporter read the question back.

4 (Record read.)

10:19 5 MR. BURNETT: Your Honor, I'm going to object to that
6 question in regards it's indefinite as to time.

7 THE COURT: Okay. Perhaps add when she believed, you
8 know, at what point.

9 MS. CARTER: Okay.

10:19 10 BY MS. CARTER:

11 Q. Ms. Castro, isn't it true that at the time Marlo Spaeth was
12 fired you believed that Walmart had an obligation under the ADA
13 to accommodate Ms. Spaeth's scheduling needs?

14 A. I did not.

10:19 15 Q. Isn't it true that at some point after Marlo Spaeth was
16 fired you came to believe that Walmart had an obligation under
17 the ADA to accommodate Ms. Spaeth's scheduling needs?

18 A. Correct.

19 Q. And isn't it true that Mr. Spude knew, because you told him,
10:20 20 that Walmart had an obligation to accommodate Ms. Spaeth's
21 scheduling needs?

22 A. I did not tell him that.

23 Q. But he knew, based on your email, that there had been a
24 request to accommodate Ms. Spaeth's scheduling needs.

10:20 25 A. Correct.

1 Q. Ms. Castro, when did you know -- when did you come to
2 know or to believe that Walmart had an obligation under the ADA
3 to accommodate Ms. Spaeth's scheduling needs?

4 A. Not until way after.

10:21 5 Q. Could you estimate a time period?

6 A. Not offhand, no.

7 Q. Was it before you called Marlo Spaeth to tell her that
8 Walmart would not rehire her?

9 A. No.

10:21 10 Q. To your knowledge, Kent Abitz never looked into
11 accommodating Marlo with her schedule; right?

12 A. I would have no idea.

13 Q. To your knowledge, I'm asking.

14 A. Correct.

10:21 15 Q. And, to your knowledge, Lee Spude never looked into
16 accommodating Marlo Spaeth schedule.

17 A. Correct.

18 Q. And, to your knowledge, Julia Stern never looked into
19 accommodating Marlo Spaeth with her schedule.

10:22 20 A. Correct.

21 Q. After the meeting you told Amy Jo Stevenson that you would
22 escalate her request --

23 A. Correct.

24 Q. -- to see if anything could be done.

10:22 25 A. Correct.

1 Q. But you never looked into whether it would be possible to
2 accommodate Marlo's schedule either, did you?

3 A. Can you repeat that, please?

4 (Record read.)

10:22 5 THE WITNESS: Correct.

6 BY MS. CARTER:

7 Q. And you never asked anyone to rehire Marlo, did you?

8 A. Not to rehire, no.

9 Q. Did you ever ask anyone -- you clarified your question "not
10:23 10 to rehire no," did you ever ask anyone to reinstate Marlo?

11 A. No.

12 Q. You were just verifying the decision to terminate her?

13 A. Correct.

14 Q. But isn't it true that Marlo's availability form indicated
10:23 15 that she could not work past 4 p.m. at the time of the
16 coachings?

17 A. That I did not see at the time.

18 Q. Are you aware of that now?

19 A. Yes.

10:23 20 Q. Let's take a closer look at this issue. Can you please turn
21 to the fifth page of Exhibit 35.

22 MS. CARTER: And, Lectrice, can you pull that up for
23 the jury and call out the dates in the middle of that page?

24 Thank you, Lectrice.

10:24 25 BY MS. CARTER:

1 Q. So, Ms. Castro, in your interview with Kent Abitz, you
2 stated that Marlo had been coached about her attendance on
3 December 22nd, 2014; right?

4 A. Yes.

10:24 5 Q. And December 17th, 2014.

6 A. Yes.

7 Q. And January 13th, 2015; right?

8 A. Correct.

9 Q. Okay. So the latest date that you provided in your
10:24 10 interview for an attendance related coaching was on January
11 13th, 2015.

12 A. That was not a coaching.

13 Q. What was --

14 A. That was just a conversation.

10:25 15 Q. So the latest date that you provided for an attendance
16 related coaching or communication was January 13th, 2015.

17 A. Correct.

18 Q. Okay. I'd like to show you what's been marked as Exhibit 1.

19 MS. CARTER: Lectrice, can you pull that up for us,
10:25 20 please.

21 BY MS. CARTER:

22 Q. This -- and if you can turn to Exhibit 1, Ms. Castro. Just
23 let me know when you are ready.

24 (Brief pause.)

10:25 25 BY MS. CARTER:

1 Q. Ready?

2 A. Yup.

3 Q. Okay. These are Marlo Spaeth's availability forms; right?

4 A. Yes.

10:25 5 Q. And on page 1 of Exhibit 1, we can see that your comanager
6 of the Manitowoc store, Bonnie Popp, filled out a new form, a
7 new availability form with Marlo on February 16th, 2015, didn't
8 she?

9 A. Yes.

10:26 10 Q. And on that February 16th, 2015 form Marlo's availability
11 was changed from noon to 4:00 p.m. to noon to 6 p.m., wasn't it?

12 A. Yes.

13 Q. So the new availability form was completed on February 16th,
14 2015, but that was over a month after the last attendance
10:26 15 discussion in January 13th, 2015, wasn't it?

16 A. Yes.

17 Q. And before Bonnie Popp filled out the new availability form
18 with Marlo in February 2015, the last availability form in
19 Marlo's file had been completed in January 2006; right?

10:27 20 A. Yes.

21 MS. CARTER: Lectrice, can you go to the second page
22 of Exhibit 1. Thank you.

23 BY MS. CARTER:

24 Q. Ms. Castro, is this Marlo Spaeth's 2006 availability form;
10:27 25 right?

1 A. Yes.

2 Q. Okay. And based on Marlo's 2006 availability form, Marlo's
3 availability was actually that she could not work past 4 p.m.,
4 until February 2015; is that correct?

10:27 5 A. Correct.

6 Q. So at the time of the first attendance coaching on December
7 17th, 2014, Marlo's availability form said that she could not
8 work past 4 p.m.; correct?

9 A. Correct.

10:28 10 Q. And isn't it true that at the time of the second coaching,
11 on December 22nd, 2014, Marlo's availability form said that she
12 could not work past 4 p.m.?

13 A. Correct.

14 Q. And at the time of the attendance discussion on January
10:28 15 13th, 2015, Marlo's availability form still said she could not
16 work past 4 p.m.; correct?

17 A. Correct.

18 Q. So even though her availability form said that she couldn't
19 work past 4 p.m., Marlo had been scheduled to work until 5:30
10:28 20 p.m.?

21 A. Correct.

22 Q. So Marlo -- so Walmart had scheduled Marlo outside of her
23 availability on all three dates that she was coached or sat down
24 and talked to about her attendance; isn't that right?

10:29 25 A. According to this, yes.

1 Q. According to your statements during the investigation.

2 A. Yes.

3 Q. It wasn't Marlo's decision to change the end time on her
4 availability form, was it?

10:29 5 A. I would not have a clue.

6 Q. You weren't present?

7 A. I was not present for that.

8 Q. Okay. But during the January 13th, discussion that you were
9 a part of, January 13th, 2015, Marlo asked for her noon to 4:00
10:29 10 schedule back, didn't she?

11 A. Yes.

12 Q. Okay, Ms. Castro. Let's talk about Walmart's decision not
13 to give Marlo her job back. Okay?

14 A. Yes.

10:29 15 Q. You told us earlier that Marlo was eligible for rehire;
16 right?

17 A. Yes.

18 Q. But despite the fact that Marlo was eligible for rehire,
19 Walmart decided not to rehire Marlo Spaeth; isn't that right?

10:30 20 A. They decided not to reinstate her.

21 Q. And they decided not to rehire her; correct?

22 MR. BURNETT: Your Honor, I don't think there's been a
23 foundation laid that the witness appreciates the distinction or
24 the difference.

10:30 25 THE COURT: Your objection is foundation?

1 MR. BURNETT: Foundation.

2 THE COURT: Overruled. Can you answer it? Or if you
3 need more clarification you can ask for it.

4 THE WITNESS: Can you please clarify it?

10:30 5 BY MS. CARTER:

6 Q. Despite the fact that Marlo was eligible for rehire and that
7 Marlo's sister, Amy Jo, asked for her to be rehired, Walmart
8 decided not to rehire Marlo Spaeth; isn't that right?

9 A. They can't be rehired if they don't apply.

10:31 10 Q. Amy Jo Stevenson asked for Marlo to be given her job back;
11 correct?

12 A. Correct.

13 Q. And when you called Marlo Spaeth what did you say to her?

14 A. I don't recall the exact words.

10:31 15 Q. Okay.

16 MS. CARTER: May I approach the witness, Your Honor,
17 to refresh her recollection?

18 THE COURT: Sure.

19 MR. BURNETT: Could we have a page and line, please.

10:31 20 MS. CARTER: Yes. If you go to Ms. Castro's dep
21 testimony on page 141, line 24 and 25.

22 THE COURT: And, Mr. Burnett, keep in mind you're
23 behind plexiglass and for us to get a record you need to have
24 the microphone a little closer.

10:32 25 MR. BURNETT: Okay, thanks.

1 BY MS. CARTER:

2 Q. Does that refresh your recollection?

3 A. Yes, that's what it says.

4 Q. Okay. So I will ask the question again.

10:32 5 Despite the fact that Marlo was eligible, Walmart
6 decided not to rehire Marlo Spaeth; isn't that right?

7 A. Yes.

8 Q. And that decision by Walmart involved people above the store
9 level; right?

10:33 10 A. Repeat that again?

11 Q. The decision not to rehire Marlo Spaeth, that involved
12 people above the Manitowoc store level.

13 A. Yes.

14 Q. Yes?

10:33 15 A. Yes.

16 Q. Lee Spude told you that Walmart would not be rehiring Marlo
17 Spaeth; right?

18 A. I don't recall the exact words he said then either.

19 MS. CARTER: Your Honor, may I approach the witness to
10:33 20 refresh her recollection?

21 THE COURT: Yes, you may.

22 (Witness peruses document.)

23 BY MS. CARTER:

24 Q. Does that refresh your recollection?

10:33 25 A. Yes.

1 MS. CARTER: And what I showed her was page 139 of her
2 deposition, lines 15 through -- lines 15 and 16.

3 MR. BURNETT: Thank you.

4 MS. CARTER: Lines 13 through 16.

10:34 5 BY MS. CARTER:

6 Q. Okay. So, Ms. Castro, Lee Spude told you that Walmart would
7 not be rehiring Marlo Spaeth; right?

8 A. Yes.

9 Q. And you don't recall him giving you any reasons why Marlo
10:34 10 couldn't have her job back, do you?

11 A. Not offhand, no.

12 Q. And so around September 2015, you called Marlo and you told
13 her that she couldn't have her job back at Walmart, didn't you?

14 A. Correct.

10:34 15 Q. In fact, you told Marlo that Walmart "would not be able to
16 rehire her," didn't you?

17 A. Yes.

18 MS. VANCE: Lectrice, can you please pull up
19 Exhibit 32, page 3.

10:35 20 BY MS. CARTER:

21 Q. And, Ms. Castro, if you can turn to that in your binder.
22 Thank you. Ms. Castro, do you see at the very bottom of
23 page 3 --

24 MS. CARTER: And, Lectrice, if you could zoom in on
10:35 25 the last the paragraph at the bottom of page 3. Or call out.

1 BY MS. CARTER:

2 Q. Ms. Castro, do you see at the very bottom of page 3, where
3 it says September 21st, 2015, note from Denise Morgan. And then
4 it says, "Follow-up email to SM Kent." That's store manager;
10:36 5 right? Kent Abitz?

6 A. Yes.

7 Q. "Follow-up email to SM Kent. Thank you for forwarding the
8 completed investigation recap. Was a closure conversation
9 conducted with Marlo, her mother and sister at the time they
10:36 10 came to the store to discuss Marlo's termination, or was someone
11 to follow up with them?"

12 Do you see that?

13 A. Yes.

14 Q. You told us a few minutes ago that you called Marlo and you
10:36 15 told her that Walmart would not be able to rehire her; right?

16 A. Yes.

17 Q. But, Ms. Castro, you never had a closure conversation with
18 Marlo's mother, did you?

19 A. No.

10:36 20 Q. And you didn't have a closure conversation with Marlo's
21 sister, Amy Jo, did you?

22 A. No.

23 Q. Ms. Castro, knowing everything you know today, if Marlo
24 Spaeth didn't need a schedule accommodation, don't you agree

10:37 25 that Marlo would not have been fired in 2015?

1 MR. BURNETT: Your Honor, I object to the question. I
2 think it calls for speculation. And it's irrelevant in the
3 sense it's retrospective.

4 THE COURT: Sustained.

10:37 5 MS. CARTER: No further questions for this witness,
6 Your Honor. Thank you.

7 THE COURT: Cross?

8 MR. BURNETT: Thank you.

9 CROSS-EXAMINATION

10:37 10 BY MR. BURNETT:

11 Q. Ms. Castro, I want to start at the very beginning. Tell us
12 where you were born and raised?

13 A. Two Rivers, Wisconsin.

14 Q. And you grew up there, go to high school?

10:37 15 A. Yes.

16 Q. Graduate from high school at Two Rivers?

17 A. Mishicot.

18 Q. Mishicot. Did you go beyond that for schooling?

19 A. I did not.

10:37 20 Q. You started work.

21 A. Yes.

22 Q. In a sentence or two, tell us the various jobs you held
23 before you went to Walmart.

24 A. I was a sales associate at a retail -- another retail store.

10:38 25 I did a little bit of bartending, waitressing. Worked at a

1 factory for a while.

2 Q. How did it come to pass that you came to work at Walmart?

3 A. I needed a job.

4 Q. And when did you start there?

10:38 5 A. In 2006.

6 Q. What position did you take?

7 A. I was an unloader, unloading trucks.

8 Q. How long did you do that?

9 A. One month.

10:38 10 Q. And then what happened next there?

11 A. I went out on maternity leave.

12 Q. And how long were you out, until you were unloading trucks
13 at eight months?

14 A. Four weeks.

10:38 15 Q. Four weeks. How long were you out on maternity leave?

16 A. I was out for four weeks.

17 Q. Oh, okay. And then you came back to Walmart at a different
18 job?

19 MS. CARTER: Objection, leading.

10:38 20 MR. BURNETT: I'll restate it.

21 THE COURT: Go ahead.

22 BY MR. BURNETT:

23 Q. Did you return to Walmart to take another position?

24 A. Yes.

10:39 25 Q. What position did you take?

1 A. It was called an inventory control specialist.

2 Q. And how long did you do that work?

3 A. Approximately a couple months.

4 Q. And then what happened?

10:39 5 A. I was promoted to department manager.

6 Q. And what department was that of?

7 A. Frozen.

8 Q. And what job did you then take on?

9 A. After that I was zone merchandise supervisor.

10:39 10 Q. And what job after that?

11 A. Assistant manager.

12 Q. And then?

13 A. Comanager.

14 Q. Okay. And now what?

10:39 15 A. Asset protection system manager.

16 Q. So it sounds like you worked your way up the ladder at
17 Walmart.

18 A. Yes.

19 Q. And you've worked at the company for how long was it?

10:39 20 A. 15 years.

21 Q. Okay. At some point in time did you come to have direct
22 interaction with Marlo Spaeth?

23 A. Yes.

24 Q. When was that?

10:40 25 A. 2010.

1 Q. How did that come to pass?

2 A. I was the zone merchandise supervisor over home lines.

3 Q. And did you directly supervise Marlo?

4 A. Yes, I did.

10:40 5 Q. For how long would you have supervised her?

6 A. Approximately a month.

7 Q. How frequently did you see her during that time?

8 A. Every scheduled shift of hers.

9 Q. And how did you and Marlo get along?

10:40 10 A. Well.

11 Q. When you would encounter Marlo what would the circumstances
12 involve?

13 A. Just following up with Marlo to see what she was doing for
14 the day.

10:40 15 Q. So how closely did you and she work together?

16 A. Not hand over hand or anything or closely; just
17 interactions. Following up.

18 Q. Did you encounter any problems with Marlo's work?

19 A. I did not.

10:41 20 Q. How did she do generally?

21 A. Good.

22 Q. As the comanager how much interaction did you have with
23 Marlo?

24 A. Almost none.

10:41 25 Q. So with what frequency would you see her?

1 A. Just passing through the area.

2 Q. Passing through the store?

3 A. Yeah.

4 Q. Do you recall any episodes involving Marlo and specifically
10:41 5 her ability to take direction and attempts to change?

6 A. Yes.

7 Q. What do you recall?

8 A. When I was a zone merchandise supervisor she was folding
9 towels and rugs a lot so I asked her if she could dust the
10:42 10 displays of coffee pots off. And I had a Swiffer with me. And
11 she told me that day that she refused. "Robin, I refuse." And
12 I handed her the Swiffer and walked off.

13 So then the next day she was scheduled I walked up to
14 her again to see how it was going, and she was -- she didn't
10:42 15 really say too much. And then by I believe it was like the
16 third time I had seen her she came up to me, she high-fived,
17 "Robin they're all done." So we went and looked at them. She
18 was able to do that task also then.

19 Q. Did she continue dusting displays --

10:42 20 A. Yes.

21 Q. -- after that? Did you have any involvement in teaching her
22 to do returns?

23 A. I did not.

24 Q. Did others?

10:42 25 A. Yes.

1 Q. Did you see that happen?

2 A. Yes, I did.

3 Q. Would you describe what you saw?

4 A. Can you clarify of --

10:43 5 Q. Sure. Tell us how you saw people -- Strike that.

6 Tell us how -- what you observed with regard to Marlo
7 doing returns. Please explain it.

8 A. So you would see when they started showing Marlo how to do
9 returns they would take her up to the service desk, grab the
10:43 10 cart, show her where to get them, do it with her, to put the
11 returns away.

12 And the returns could be stuff from laying from the
13 store that would be all in a centralized area. And she would --
14 they would show her how to go get them, how to put them away.

10:43 15 It wasn't perfect every time, but she learned to do
16 that task.

17 Q. Okay. And did she continue to do returns well throughout
18 your exposure to her?

19 A. Yes.

10:43 20 Q. There was testimony yesterday that somebody came to court
21 and said that they had heard you were picking on Marlo; is that
22 true?

23 A. No.

24 Q. Have you ever said anything negative or disparaging to
10:44 25 Marlo?

1 A. I never have, no.

2 Q. Do you have any experience with people with disabilities?

3 A. Yes.

4 Q. Would you tell us about that?

10:44 5 A. I have a son with disabilities. He's 14 years old.

6 Q. What kind of disability does he have?

7 A. He has epilepsy seizures, and he has extreme developmental
8 delays, and has social outbursts also.

9 Q. And you said he was 14?

10:44 10 A. Yes.

11 Q. So are you sensitive to people with disabilities?

12 A. Yes, I am.

13 Q. Before November 2014, did Marlo's work schedule change
14 occasionally?

10:45 15 A. That I don't recall.

16 Q. Before November 2014, did you ever have a conversation with
17 Amy Jo Stevenson?

18 A. I did not.

19 Q. With Sandy Barnes?

10:45 20 A. No.

21 Q. When something came up at work with Marlo, did you deal
22 directly with Marlo about it?

23 MS. CARTER: Objection, leading.

24 THE COURT: Overruled.

10:45 25 BY MR. BURNETT:

1 Q. Let me restate the question. Do you recall any problems
2 with Marlo over the years that you were required to call upon
3 others besides Marlo to deal with?

4 A. No.

10:46 5 Q. After November 2014, did scheduling changes occur at
6 Walmart?

7 A. Yes.

8 Q. Would you describe the circumstances surrounding those?

9 A. It was called customer first scheduling. So it was
10:46 10 generated scheduling that was based around customer traffic in
11 the store.

12 Q. And did you observe any change in Marlo's schedule?

13 A. I did not.

14 Q. Did you hear about any issues involving Marlo and
10:46 15 attendance?

16 A. Yes.

17 Q. Who did you speak with and what did you hear?

18 A. I overheard it in the management office.

19 Q. And what did you hear?

10:46 20 A. Just about Marlo's attendance.

21 Q. Who were you overhearing?

22 A. It was Karen and Bonnie.

23 Q. Karen Becker, Bonnie Popp?

24 A. Yes.

10:47 25 Q. What were their roles?

1 A. Bonnie Popp was the comanager over that area, and Karen
2 Becker was the personnel.

3 Q. Okay. When you say Bonnie Popp was the comanager over that
4 area, would you explain what that means?

10:47 5 A. So there's comanagers throughout the whole store. We each
6 had areas and there was -- I was over the food/consumable side,
7 Bonnie was over the -- it was called the hard line side. We had
8 a backroom comanager and an overnight manager.

9 Q. Okay. Who was the supervisor responsible for Marlo's
10:47 10 attendance after November of 2014?

11 A. As far as salaried manager?

12 Q. Yes.

13 A. Bonnie Popp.

14 Q. Do you recall a meeting in January of 2015 where Marlo was
10:48 15 counseled?

16 A. Yes.

17 Q. Where did that meeting happen?

18 A. In the management office.

19 Q. And who attended it?

10:48 20 A. Julie, myself, and Marlo.

21 Q. And why were you there?

22 A. Just to be a witness.

23 Q. What was the purpose of the meeting?

24 A. Just to have a verbal discussion with Marlo about her
10:48 25 attendance again.

1 Q. Did you say anything at that meeting?

2 A. Yes.

3 Q. What would you have said?

4 A. I recall asking her why she was not working her scheduled
10:48 5 shifts.

6 Q. Did Marlo respond?

7 A. Not until I asked her to repeat what we were saying, and she
8 did respond by saying, yes, that she needed to work her
9 scheduled shifts.

10:49 10 Q. Okay. So why did you ask her to repeat?

11 A. Just to make sure that she understood.

12 Q. Was that something that you would ordinarily do with an
13 employee?

14 A. Yes.

10:49 15 Q. Did you encounter anything in that meeting with Marlo that
16 led you to believe she didn't understand why she was there?

17 A. No.

18 Q. Or what she was being asked to do?

19 A. No.

10:49 20 Q. Or what she was -- or what was expected of her?

21 MS. CARTER: Objection, foundation. Speculation.

22 THE COURT: Overruled.

23 BY MR. BURNETT:

24 Q. Do you have the question in mind? Or do you want me to
10:49 25 repeat it?

1 A. Could you repeat that?

2 Q. Sure. Did you encounter anything at that meeting that led
3 you to believe that Marlo didn't understand what was expected of
4 her?

10:49 5 A. No.

6 Q. Did she provide any explanation that you can recall at that
7 meeting as to why she wasn't working her schedule?

8 A. Yes, that she was afraid that she was going to miss the bus.

9 Q. Did somebody explain to Marlo at that meeting as to whether
10:50 10 or not she was likely to miss the bus?

11 MS. CARTER: Objection, leading.

12 THE COURT: Overruled. Can you answer it?

13 THE WITNESS: Can you repeat it again? I'm sorry.

14 BY MR. BURNETT:

10:50 15 Q. Did anybody respond to Marlo's concerns at that meeting as
16 to whether -- about missing the bus?

17 A. I don't recall.

18 Q. You also talked about being present at a meeting after Marlo
19 was let go; do you remember that?

10:51 20 A. Yes.

21 Q. Again, where did that meeting happen?

22 A. Also in the management office.

23 Q. And, again, who was present?

24 A. Marlo, Amy Jo, Susan Barnes, Bonnie Popp, Karen Becker, and
10:51 25 myself.

1 Q. And how long would that meeting have lasted; do you know?

2 A. Offhand I can't remember.

3 Q. How did the meeting start out, can you tell us?

4 A. Like the atmosphere or the like --

10:51 5 Q. Well start with the atmosphere. What was the atmosphere
6 like?

7 A. It was laid back. Everybody was calm, talking.

8 Q. Okay. And who spoke first, if you know?

9 A. I don't recall.

10:52 10 Q. How did the meeting evolve?

11 A. We just started talking about Marlo. I remember Susan
12 Barnes talking about Marlo growing up, potty training her. I
13 talked a little bit about my son back and forth with Susan.
14 Then Amy Jo started asking about the scheduling and why she
10:52 15 couldn't be rehired.

16 Q. Sounds like your memory's a little vague.

17 A. Yeah.

18 Q. Got it. Do you recall the message Amy Jo Stevenson
19 communicated at that meeting about rehiring Marlo?

10:52 20 A. Yes, that if we did not rehire or reinstate her that,
21 according to the ADA act, she would take further action.

22 Q. What did you interpret that to mean?

23 A. That she was going to seek legal action. Basically I took
24 it as a threat; that if we didn't rehire her, or reinstate her,
10:53 25 whichever, that she was going to seek legal action.

1 Q. What did Walmart policy require you to do under those
2 circumstances?

3 A. At that time then we just end the conversation and we report
4 it to the ethics hotline.

10:53 5 Q. Is that what happened?

6 A. Yes.

7 Q. So you made that report and we went through that. Was there
8 an investigation that was done into the decision to terminate
9 Marlo?

10:53 10 A. Yes.

11 Q. And who conducted that investigation?

12 A. That would have been all done through the red book
13 investigation.

14 Q. You were not involved in that?

10:53 15 A. Just interviewed for it.

16 Q. Got it. And we saw some of that and we'll go through that
17 in a little bit. At the end of the day, did you hear the
18 results of that investigation?

19 A. Yes.

10:54 20 Q. What was concluded?

21 A. That we were still to terminate Marlo; that we weren't going
22 to reinstate her or rehire her.

23 Q. You were told to call and tell Marlo that.

24 A. Correct.

10:54 25 Q. So did you call her?

1 A. Yes.

2 Q. How long did the call last?

3 A. Less than five minutes.

4 Q. What did you say to Marlo?

10:54 5 MS. CARTER: Objection. This has already been gone
6 over, Your Honor.

7 THE COURT: Overruled.

8 BY MR. BURNETT:

9 Q. What did you say to Marlo as best as you can recall?

10:54 10 A. Well, it was brought clear to me in the last part that I
11 told her that she would not be rehired.

12 Q. Are you sure you used the word "rehire" or not?

13 A. According to my deposition, yes.

14 Q. Okay. And did Marlo have anything to say in response?

10:55 15 A. Not that I recall, no.

16 Q. Did you have any other involvement with decisions to rehire
17 or reinstate Marlo?

18 A. I did not.

19 Q. Okay. What I'd like to do next, if we can, is I'd like to
10:55 20 go through some of the policies that you were shown and talk to
21 you about some parts that were not addressed.

22 So if we can go to Exhibit No. 26, that's EEOC Exhibit
23 Number 26. That's the reinstatement.

24 MR. BURNETT: Can we have that up, please?

10:56 25 BY MR. BURNETT:

1 Q. That's the reinstatement and rehire policy; correct?

2 A. Yes.

3 Q. Are those two different terms?

4 A. Yes.

10:56 5 Q. Do they have two different meanings in Walmart?

6 A. Yes.

7 Q. The very first paragraph, do you see that under the word
8 "rehire"?

9 A. Yes.

10:56 10 Q. What does "rehire" mean under Walmart's policy?

11 A. Do you want me to read it?

12 Q. I want you to tell us.

13 A. So rehire, you have to apply into the Walmart's online
14 hiring center.

10:57 15 Q. So if we highlight that particular paragraph, if we could,
16 please, it says "former associates, who apply for employment and
17 are eligible for rehire, must go through the same competitive
18 selection process as all other external applicants."

19 Is that right?

10:57 20 A. Yes.

21 Q. So that means you just start at square 1 as if you were a
22 new person who wanted a job at Walmart.

23 A. Correct.

24 MR. BURNETT: Thank you. Could you take that down?

10:57 25 BY MR. BURNETT:

1 Q. Does the rehire process require a written application?

2 A. It's all online.

3 Q. Okay. It's not oral, you don't call somebody up and say I'd
4 like a job and that's not considered an application, is it?

10:57 5 MS. CARTER: Objection, leading.

6 MR. BURNETT: I'll restate it.

7 BY MR. BURNETT:

8 Q. Do people apply verbally for jobs at Walmart?

9 A. No.

10:58 10 Q. Then it's talks about eligibility for rehire and Marlo was
11 eligible for rehire when she was let go; correct?

12 A. Yes.

13 MS. CARTER: Objection, leading. But she's already
14 answered.

10:58 15 THE COURT: We could be here all day.

16 Go ahead, Mr. Burnett.

17 MR. BURNETT: Thank you.

18 BY MR. BURNETT:

19 Q. Was that explained at the termination meeting you went to?

10:58 20 The posttermination meeting with Amy Jo Stevenson, was the
21 subject of rehireability discussed?

22 A. I do not recall.

23 Q. Okay. Then there's a passage under "rehire within 30 days;"
24 do you see that?

10:58 25 A. Yes.

1 Q. The first sentence says, "The rehiring center will not allow
2 a former associate to reapply for approximately 30 days, two
3 payroll periods of their termination." What does that mean?

4 A. The system will not let them go online and apply before
10:59 5 that.

6 Q. Okay. Then if we can go to the next page of that exhibit.
7 This page talks about reinstatement; is that right?

8 A. Yes.

9 Q. Are rehiring and reinstatement different?

10:59 10 A. Yes.

11 Q. How do they differ?

12 A. A reinstatement you do not have to reapply online.

13 Q. So this particular passage of the policy says,
14 "Reinstatement restores an associate's employment as if the
11:00 15 termination had not occurred, including an original hire date,"
16 et cetera. Do you see that?

17 A. Yes.

18 Q. And that requires the approval of a human resources manager;
19 correct?

11:00 20 A. That is correct.

21 MR. BURNETT: If we can go to Exhibit 30. Can we put
22 that up, please.

23 BY MR. BURNETT:

24 Q. This is the accommodation policy that you were questioned
11:01 25 about extensively; correct?

1 A. Yes.

2 Q. If we can go to the second paragraph, the one that begins
3 "this document provides." That says, "This document provides
4 guidelines and directives for responding to associate's requests
11:01 5 for job assistance. Job assistance includes job aids and
6 reasonable accommodations." Do you see that?

7 A. Yes.

8 Q. So what are job aids and what are reasonable accommodations?

9 A. Job aids would be more like if somebody needed to have a
11:01 10 stool at certain points during their shift.

11 And then a reasonable accommodation is anything else
12 other than --

13 Q. I don't mean to interrupt you, but are job aids something
14 that can be decided upon in the store?

11:02 15 A. Yes.

16 Q. And are reasonable accommodations something that have to be
17 referred to another part of Walmart outside the store?

18 A. Yes.

19 Q. What's that other part of Walmart called?

11:02 20 A. Associate Accommodation Center.

21 Q. Thank you. If we can go to page 2.

22 Before we leave that. There's a paragraph heading
23 called "Requests That Can be Approved as JAs/Job Assistance."
24 Do you see that?

11:02 25 A. Yes.

1 Q. Then if we can go to page 2, which is part of that
2 paragraph. And if we can highlight the passage that says --
3 that addresses scheduling.

4 That says, "Minor changes to availability and
11:03 5 scheduling preferences." That would be part of a job
6 assistance; correct?

7 A. Yes.

8 Q. But you weren't read this: "Does not" -- and "not" is
9 underlined -- "include approvals of set schedules, guaranteed
11:03 10 hours, or creating special schedules."

11 A. Correct.

12 Q. Would returning Marlo to her original 12:00 to 4:00 schedule
13 be considered a set schedule, a guaranteed hours, or a special
14 schedule?

11:03 15 A. I believe it would be all three.

16 Q. Okay. In order to get a reasonable accommodation does the
17 employee need to do something?

18 A. She would have to have -- they'd have to give her the
19 accommodation packet, or the person could call the Accommodation
11:04 20 Center themselves.

21 Q. Is the first thing -- let's go back to the first page if we
22 could. Under the paragraph -- the first sentence under the
23 paragraph identifying a request for a job assistance. See that?

24 A. Yes.

11:04 25 Q. Let's go highlight the first sentence if we could, please.

1 It says, "An associate may request job assistance in a
2 variety of ways. He or she may make the request directly, or
3 through a family member," et cetera. "The request may be made
4 verbally or in writing."

11:05 5 You were asked all about that on direct examination.
6 Do you remember that?

7 A. Yes.

8 Q. But according to this policy the associate has to request
9 it.

11:05 10 A. Correct.

11 Q. When you heard for the first time that Marlo wanted to
12 return to her original schedule, did you conceive that that
13 could possibly be a request for an accommodation?

14 A. I did not, no.

11:05 15 Q. Tell us why.

16 A. She was asking just to be put back to her old schedule.

17 Q. Did she say anything about needing it because of her
18 disability?

19 A. No, she did not.

11:05 20 Q. Marlo's got some limitations in communications; correct?

21 A. Yes.

22 Q. But you dealt with Marlo for many years, true?

23 A. Mostly during the month that I worked with her.

24 Q. Okay. And the explanation she gave was about missing the
11:06 25 bus.

1 A. Correct.

2 Q. Anything that she said that would have alerted you in that
3 meeting that she wanted a reasonable accommodation for her
4 disability?

11:06 5 A. No.

6 Q. If we can go to Exhibit 32. Page 2 if we could.

7 MR. BURNETT: Could you highlight that paragraph that
8 starts on July 16th?

9 BY MR. BURNETT:

11:07 10 Q. You were talked to about the very first sentence:

11 "On July 16th, 2015, Amy Jo threatened to sue the
12 company under the Americans With Disabilities Act unless Marlo
13 was rehired."

14 But you weren't asked about this next sentence:

11:07 15 "Robin said Marlo's termination was based on
16 attendance and scheduling issues and had nothing to do with her
17 disability."

18 Is that what you told this investigator?

19 A. Yes.

11:07 20 Q. Is that what you believed then?

21 A. Yes.

22 Q. Is that what you believe now?

23 A. Yes.

24 Q. Why?

11:07 25 A. I don't feel that she was actually asking for any type of

1 accommodation. We gave her a schedule.

2 Q. At any point in time -- you were asked about being asked
3 your opinion and before Marlo was discharged and that type of
4 thing. At any point in time did anybody say we want to rid
11:08 5 ourselves of an employee who has Down syndrome?

6 A. Never.

7 Q. Was that ever a thought in your mind?

8 A. No.

9 Q. Could you discern whether anybody else believed that?

11:08 10 A. No.

11 Q. Did you try to help Marlo with her attendance issue?

12 A. Besides the conversation we did have between all management
13 personnel, we would actually -- made sure she was watched by the
14 time clock to make sure she wasn't punching out early. Her
11:09 15 supervisors during that time also would just keep an eye on her
16 to make sure she was working her scheduled shift.

17 Q. Did you count up Marlo's occurrences before she was let go?

18 A. Yes.

19 Q. And did you count up how many days she had actually missed
11:09 20 work before she was let go without calling you?

21 A. I don't recall how many offhand.

22 Q. How many occurrences did Marlo have?

23 A. 17.

24 Q. And when an employee has 17 occurrences, what's Walmart's
11:09 25 termination policy?

1 A. That you would terminate the associate.

2 Q. And is there -- do you recall the policy as to when an
3 employee might be terminated in terms of the number of
4 occurrences accumulated?

11:09 5 A. At that time it was seven.

6 Q. Any explanation as to why people waited, didn't terminate
7 Marlo at seven, didn't terminate her at 14, but did it at 17?

8 A. They were trying to give her several chances.

9 Q. You were asked some questions on Exhibit 32 again -- I'm
11:10 10 sorry, this is Exhibit 1013.

11 (Exhibit 1013, Coaching - March 18, 2015 [Dkt.
12 102-24], admitted previously by stipulation.)

13 BY MR. BURNETT:

14 Q. You were asked some questions that may have suggested that
11:10 15 all the coachings Marlo got predated the change in her
16 availability form. Do you remember that line of questioning?

17 A. Yes.

18 Q. And that was based on a submission that you made to the
19 investigator listing three specific dates. Do you recall all
11:11 20 that?

21 A. Yes.

22 Q. Look at 1032. I'm sorry, 1013.

23 A. Can you tell me which exhibit number that is?

24 Q. Do you recognize that?

11:11 25 A. Which exhibit number is that?

1 Q. That's --

2 THE COURT: The big book.

3 THE WITNESS: Oh.

4 BY MR. BURNETT:

11:11 5 Q. And it might be on the screen right behind you.

6 A. I can't see very well on that screen.

7 Q. 1013.

8 A. Okay.

9 Q. Do you have that in front of you?

11:11 10 A. Yes.

11 Q. Was that something that you were involved in?

12 A. I was not.

13 Q. Do you recognize the form?

14 A. Yes.

11:11 15 Q. And if you would read the form to yourself real quickly,
16 what does it involve?

17 A. It's a second level of written coaching, online coaching for
18 attendance and punctuality.

19 Q. What's the date on that?

11:12 20 A. 3/18/2015.

21 Q. That would be after Marlo's availability form was changed;
22 correct?

23 A. Correct.

24 MR. BURNETT: May I have a second to talk to counsel,

11:12 25 Your Honor?

1 THE COURT: Yeah.

2 MR. BURNETT: Thank you.

3 (Defense counsel confer.)

4 MR. BURNETT: That's all the questions I have.

11:12 5 THE COURT: Okay. Any redirect?

6 MS. CARTER: Yes, Your Honor. I'll try to be brief.

7 REDIRECT EXAMINATION

8 BY MS. CARTER:

9 Q. Ms. Castro, you told us a few minutes ago that you didn't
11:12 10 think Marlo's request had anything to do with her limitations?

11 A. No, I did not.

12 Q. Ms. Castro, we heard you testify about teaching Marlo new
13 tasks like dusting; right?

14 A. Yes.

11:13 15 Q. And others teaching Marlo to do returns; right?

16 A. Yes.

17 Q. And you testified that to teach Marlo to do returns her
18 supervisors did the task with her; right?

19 A. Yes.

11:13 20 Q. And is it fair to say that Marlo can adjust to change with
21 the right amount of support?

22 A. Yes.

23 Q. When Marlo learned how to do -- how to dust the coffee
24 makers, right? You testified about that, that you taught her or
11:13 25 you told her to learn how to dust coffee makers; right?

1 A. Yes.

2 Q. Was Marlo working her noon to 4:00 schedule when you told
3 her to learn how to dust coffee makers?

4 A. No.

11:13 5 Q. When was --

6 A. Yes, she was. Sorry.

7 Q. So Marlo was working her noon to 4:00 schedule when she
8 learned how to dust coffee makers.

9 A. Yes.

11:14 10 Q. And Marlo was working her noon to 4:00 schedule when she
11 learned how to do returns.

12 A. That I don't recall the timeline.

13 Q. Would you say that Marlo learned to do returns more than a
14 year before she was terminated?

11:14 15 A. It's possible. But, like I said, I don't recall the
16 timeline of that.

17 Q. Now, you were asked a few moments ago about Walmart's rehire
18 and reinstatement policy. That was Exhibit 26.

19 A. Yes.

11:14 20 Q. You said -- you mentioned that Marlo had not reapplied.

21 A. Correct.

22 Q. But you told Marlo Spaeth that Walmart would not be able to
23 rehire her, didn't you?

24 A. Yes.

11:15 25 Q. And you called her more than 30 days after Marlo was fired;

1 right?

2 A. Yes.

3 Q. And you didn't mention anything about submitting an
4 application, did you?

11:15 5 A. I did not.

6 Q. And Marlo's family met with Walmart less than 30 days after
7 Marlo was fired; correct?

8 A. Yes.

9 Q. And that was when Amy Jo Stevenson verbally requested that
11:15 10 Marlo be given her job back; correct?

11 A. Yes.

12 Q. And you testified a few moments ago that an associate cannot
13 reapply within 30 days of their termination; is that correct?

14 A. Yes.

11:15 15 Q. Because the system won't even allow them to submit the
16 application; correct?

17 A. Correct.

18 Q. So at the time that Amy Jo Stevenson asked for Marlo to be
19 given her job back, she couldn't submit an application; correct?

11:15 20 A. That is correct.

21 Q. And then the next thing that Marlo heard from you is that
22 Walmart would not be able to rehire her.

23 A. Yes.

24 Q. Okay. Let's talk about Exhibit 30.

11:16 25 A few moments ago Mr. Burnett asked you about job

1 aids; right?

2 A. Yes.

3 Q. The kinds of job aids that can be approved in store;
4 correct?

11:16 5 A. Yes.

6 Q. Versus the kind that cannot be approved in store; correct?

7 A. Yes.

8 Q. And he directed you to look at the second page of Exhibit 30
9 where it mentions scheduling job aids, scheduling

11:16 10 accommodations; correct?

11 A. Yes.

12 Q. And it says, "Scheduling. Minor changes to availability and
13 scheduling preferences can be approved in store." Correct?

14 A. Yes.

11:17 15 Q. And that requests for set schedules, guaranteed hours, or
16 special schedules cannot be approved in store; correct?

17 A. Correct.

18 Q. And you testified that Marlo Spaeth asked for a set
19 schedule; correct?

11:17 20 A. Yes.

21 Q. In fact, you said she asked for all three of the things that
22 could not be approved in store; correct?

23 A. Correct.

24 Q. And what were you supposed to do under this policy if you
11:17 25 received a request that could not be approved in store?

1 A. (No response.)

2 Q. You were supposed to forward it to the Accommodations
3 Services Center, weren't you?

4 A. Yes.

11:17 5 Q. But you didn't.

6 A. Nope.

7 Q. And no one else did.

8 A. No.

9 MS. CARTER: No further questions for this witness,
11:18 10 Your Honor. Thank you, Ms. Castro.

11 THE COURT: You can step down then.

12 (Witness excused at 11:18 a.m.)

13 THE COURT: Plaintiff may call their next witness.
14 Thank you, Ms. Castro.

11:18 15 MS. VANCE: Your Honor, at this time the EEOC would
16 like to read in deposition designations from Lee Spude.

17 THE COURT: Okay.

18 MR. HARLAN: Your Honor, if I can just make a request.
19 Is it possible to get the page number and line numbers as
11:19 20 they're being read? Because the last time they were just read
21 consistently and I couldn't tell what lines were being read. So
22 we can keep track.

23 MS. VANCE: To announce the page?

24 MR. HARLAN: Yeah, just the page would be fine. I can
11:19 25 obviously track --

1 MR. MULAIRE: I believe these were all provided to
2 counsel prior to the trial.

3 THE COURT: They're highlighted, yeah. This is
4 document no. 223. But if you don't have that with you,
11:19 5 Mr. Harlan, maybe you can just read it as you move to a
6 different spot?

7 MR. HARLAN: Thank you.

8 THE COURT: Like if you're going to begin on page, I
9 guess it's 56, and then when you move to a new spot say the new
11:19 10 page number.

11 MR. MULAIRE: We don't have to announce each page
12 turn?

13 THE COURT: Right.

14 MR. MULAIRE: Okay.

11:20 15 MS. VANCE: The EEOC will now read excerpts from the
16 deposition of Lee Spude. This deposition was taken November
17 14th, 2018.

18 LEE SPUDE, PLAINTIFF WITNESS, VIA DEPOSITION

19 DESIGNATIONS READ AS FOLLOWS:

11:20 20 Q. Good afternoon, Mr. Spude, would you please state your full
21 name for the record.

22 A. Lee David Spude.

23 Q. What is your title professionally at your job?

24 A. Market human resource manager, commonly referred to as MHRM.

11:20 25 Q. Am I right that the Manitowoc Walmart store was within your

1 scope of management in 2014 and 2015?

2 A. Yes. I was enrolled at the very end of 2014. So when you
3 asked me if I was in scope in 2014 and '15, it would have been
4 as long as I held the position, which was very late in 2014 and
11:21 5 then through 2015.

6 Q. And is that the same position you're currently in?

7 A. Yes.

8 * * *

9 (Deposition read-in interrupted.)

11:21 10 THE COURT: What page are you on?

11 MS. VANCE: Now we're on page 27.

12 THE COURT: This is now 27 of the deposition?

13 MS. VANCE: Yes. The transcript, Your Honor.

14 We're in Lee Spude, not in the corporate deposition.

11:21 15 THE COURT: Oh, okay.

16 MS. VANCE: Should we pause, Your Honor?

17 THE COURT: Just a minute. Go ahead.

18 (Deposition read-in resumed.)

19 Q. Mr. Spude, if an employee at the Manitowoc store in 2015 was
11:21 20 terminated and eligible for rehire, is it correct that any
21 manager from the Manitowoc store could go into the Smart System
22 to reactivate their employment if fewer than 30 days had passed
23 from the termination?

24 A. You are accurate that systematically any manager would be
11:22 25 able to go into the Smart System and activate an associate, and

1 that would systematically put them back into our system so long
2 as they completed it within 30 days.

3 Q. If an employee at the Manitowoc store in 2015 was terminated
4 and eligible for rehire but more than 30 days had passed, is it
11:22 5 true that you personally, as market human resources manager, you
6 are the person who could reactivate the employment of that
7 employee in the Smart System?

8 A. That is correct. Me, or anyone at my level or higher could
9 initiate the reinstatement process.

11:22 10 Q. And that's in the Smart System; correct?

11 A. In -- I'm sorry, I misunderstood your question. So the
12 answer is no. As a market human resource manager I don't have
13 the ability to initiate anything in the Smart System. However,
14 we have a separate reinstatement process that I would be able to
11:23 15 initiate at market level after 30 days have passed.

16 (Deposition read-in concluded at 11:23 a.m.)

17 * * *

18 MR. MULHAIRE: That concludes the deposition.

19 MS. VANCE: Thank you. That concludes the deposition
11:23 20 reading from Lee Spude, November 14th, 2018.

21 And, Your Honor, next at this time the EEOC will read
22 excerpts from the deposition of Denise Morgan taken March 1st,
23 2019.

24 LINDA DENISE MORGAN, PLAINTIFF WITNESS, VIA DEPOSITION

11:24 25 DESIGNATIONS READ AS FOLLOWS:

1 Q. Would you please state your full name for the record.

2 A. Linda Denise Morgan.

3 Q. Are you currently working in headquarters?

4 A. Yes.

11:24 5 Q. Am I right that you've never worked in a Walmart store?

6 A. I have not.

7 Q. What is your job title in July of 2015?

8 A. Ethics manager.

9 Q. What was the name of the department that you worked in as
11:24 10 ethics manager?

11 A. Ethics.

12 Q. In your words, can you tell me, in general, what is the
13 Global Ethics hotline?

14 * * *

11:25 15 (Deposition read-in interrupted.)

16 MR. HARLAN: What page is that?

17 MS. VANCE: 26.

18 MR. HARLAN: 25?

19 MS. VANCE: Starts at 25, yes.

11:25 20 MR. HARLAN: Thank you.

21 (Deposition read-in resumed.)

22 A. It's a number where associates and customers can report
23 concerns about Walmart.

24 Q. The types of Global Ethics hotline reports that you would
11:25 25 investigate include disability discrimination; correct?

1 A. Yes.

2 Q. Ms. Morgan, I'll direct your attention to what's been
3 admitted as Exhibit 32. Do you recognize this document?

4 * * *

11:25 5 (Deposition read-in interrupted.)

6 MS. VANCE: And, Lectrice, can we have 32 come up?

7 (Deposition read-in resumed.)

8 Q. Do you recognize this document?

9 A. I do.

11:26 10 Q. What is it?

11 A. It's the case details that came in through the ethics
12 hotline.

13 Q. Who is the subject of these case details?

14 A. Julia Stern and Bonnie Popp.

11:26 15 Q. In Exhibit 32 who is the person who made the report?

16 A. Robin Castro.

17 Q. I believe you testified that you investigated several types
18 of reports to the Global Ethics hotline. Among them are
19 business misconduct reports as one category, and discrimination
11:26 20 or harassment reports as another kind of category; is that
21 correct?

22 A. That's correct.

23 Q. How would you characterize, knowing those categories,
24 Exhibit 32?

11:27 25 A. This was classified as a disability discrimination.

1 Q. If Julia Stern is listed as one of the subjects of the
2 investigation, is it a fair statement that the investigation
3 then is a question of is Julia Stern somebody who may have
4 discriminated on the basis of disability?

11:27 5 A. When it was reported she was listed as a subject regarding
6 the disability discrimination.

7 Q. What does it mean that she's a subject?

8 A. That she was involved in the allegations that were reported.

9 Q. Does it mean that she was involved as one of the people who
11:27 10 should be investigated for whether or not there was disability
11 discrimination against a Walmart associate?

12 A. Correct.

13 Q. And that same line of questioning, Bonnie Popp is also
14 listed as a subject; correct?

11:28 15 A. Correct.

16 Q. Ms. Morgan, did you review the performance evaluations of
17 Marlo Spaeth?

18 A. No.

19 Q. Is there a way from reading Exhibit 32 that you can tell who
11:28 20 you assigned or who you determined would be the investigator?

21 A. Yes.

22 Q. Show me, please.

23 A. If you go back to page D1014, the first page. It has --
24 under "parties involved" it has Kent Abitz as the authorized
11:28 25 assignment. And then his job title shows SM for store manager.

1 Whoever in the parties involved is the authorized assignment,
2 that's who's assigned as the investigating manager.

3 Q. Who makes the determination about which people -- in this
4 situation, who made the determination about which people would
11:29 5 be listed in the recap report for Kent Abitz to interview?

6 A. I would have made that designation on the report that was
7 sent to him based on the information that was received from the
8 caller.

9 Q. Okay. I'm handing you what's been marked as Exhibit 33.
11:29 10 I'd ask you to look through that document and let me know if you
11 recognize this document. What is Exhibit 33?

12 A. Yes, I recognize it. There are emails and also a copy of
13 the investigation recap.

14 Q. So then I'll direct your attention to the page marked D1045,
11:30 15 page 2. We see the reporter's name is Amy Jo, last name
16 unknown; correct?

17 A. Correct.

18 Q. Did you fill out that information in the investigation
19 recap?

11:30 20 A. Yes.

21 Q. The recorder's position, this refers to Amy Jo's position,
22 and am I right that you filled out Marlo's sister and legal
23 guardian?

24 A. Yes.

11:30 25 Q. And the store does not have paperwork regarding legal

1 guardian; is that correct?

2 A. That's correct.

3 Q. Then for our next section, other parties involved, I see a
4 list of four names: Marlo Spaeth, former associate; Julia
11:31 5 Stern, assistant store manager; Bonnie Popp, spelled P-o-p-p,
6 SHM; and Robin Castro, SHM.

7 Do you follow where I'm at?

8 A. Yes, I do.

9 Q. I see an X in the row with Marlo Spaeth's name by "other
11:31 10 party involved." Can you tell me, what does that mean?

11 A. Other involved party, that's just someone that's not the
12 subject but they are an involved party.

13 Q. So to Kent Abitz, what does it mean to have Marlo Spaeth
14 listed as an other involved party for the purposes of his work
11:31 15 to complete this recap report?

16 A. Well, she was an other involved party because she was a
17 former associate, and the investigation was regarding her
18 termination.

19 Q. How does Kent Abitz know what you want -- know who you want
11:32 20 him to interview -- or how did Kent Abitz know who you wanted
21 him to interview?

22 A. On page D1044, where it says "Interviews," "interview all
23 parties involved and obtain statements."

24 * * *

11:32 25 (Deposition read-in interrupted.)

1 MS. VANCE: And, Lectrice, can we get page 1 of the
2 exhibit, please? There it is. Thank you.

3 (Deposition read-in resumed.)

4 Q. So interview all parties involved and obtain statements
11:32 5 would be -- would include Marlo Spaeth who is designated as
6 other party involved; correct?

7 A. Yes.

8 Q. And it would include Julia Stern; correct?

9 A. Yes.

11:32 10 Q. And it would include Bonnie Popp; correct?

11 A. Yes.

12 Q. And it would include Robin Castro; right?

13 A. Yes.

14 Q. Is the reporter who here we have Amy Jo, last name unknown,
11:32 15 included in that instruction, "interview all parties involved
16 and obtain statements"?

17 A. Yes.

18 Q. The documentation we have shows that you didn't review any
19 emails about Marlo that were internal Walmart emails; correct?

11:33 20 A. That's correct. I don't recall seeing that email.

21 Q. I want to make sure I understand your answer. Am I right
22 that on July 30th, you gave Kent Abitz an investigation recap
23 form that should have caused him to interview Amy Jo, last name
24 unknown, as the reporter, and Marlo Spaeth as other party
11:33 25 involved; is that correct?

1 A. The investigation recap listed Amy Jo as the reporter, and
2 Marlo as a former associate, as other involved party that I sent
3 to Kent Abitz.

4 Q. An investigation that never included an interview of Amy Jo;
11:33 5 right?

6 A. Correct. She was not interviewed.

7 Q. The investigation also did not include any questioning of
8 Marlo Spaeth; correct?

9 A. It did not. So she was a former associate.

10 (Deposition read-in concluded at 11:34 a.m.)

11 * * *

12 MS. VANCE: That ends the reading from the deposition
13 of Denise Morgan. And, Your Honor, at this time plaintiff will
14 call Marlo Spaeth.

11:36 15 THE CLERK: Ms. Spaeth, please raise your right hand.

16 MARLO SPAETH, PLAINTIFF WITNESS, DULY SWORN

17 THE CLERK: Thank you.

18 MS. CARTER: Can you hear her okay?

19 THE COURT: Yup. Go ahead.

11:36 20 DIRECT EXAMINATION

21 BY MS. CARTER:

22 Q. Hey, Marlo, can you look over at me? Can you hear me,
23 Marlo?

24 A. (No response.)

11:36 25 MS. CARTER: Can I approach?

1 THE COURT: Sure. Uh-huh.

2 MS. CARTER: Is it okay if I ask her questions while
3 standing?

4 THE COURT: Yes.

11:37 5 BY MS. CARTER:

6 Q. So take a minute and get comfortable and let me know when
7 you're ready, okay?

8 A. I am ready.

9 Q. You're ready? Good. Can you tell us your name?

11:37 10 A. Marlo Spaeth.

11 Q. And how are you feeling today, Marlo?

12 A. Good. Nervous.

13 Q. Nervous? Yeah? Will you tell us the truth today?

14 A. Like what?

11:37 15 Q. Like if I ask you a question, will you tell us the truth?
16 You're nodding. Is that a yes?

17 A. Yes.

18 Q. Okay, Marlo, let's get to know you a little better. All
19 right? Who is Amy?

11:38 20 A. My sister, Amy.

21 Q. Your sister, Amy? Does Amy make good cookies?

22 A. Yes.

23 Q. They're good cookies; right? What kind of cookies does Amy
24 make?

11:38 25 A. Peanut butter, chocolate chip, and sugar cookies.

1 Q. Peanut butter, chocolate chip, and sugar cookies?

2 A. Yes.

3 Q. And what kind is your favorite?

4 A. Both.

11:38 5 Q. Both. And where do you live, Marlo?

6 A. Manitowoc.

7 Q. Manitowoc? Is there a grocery store near your house?

8 A. Piggly Wiggly.

9 Q. That's near your house? Yes?

11:38 10 A. Yes.

11 Q. Do you live with anyone?

12 A. My sister, Barb. My stepsister.

13 Q. Your stepsister, Barb?

14 A. Yes.

11:39 15 Q. Do you like living with Barb?

16 A. Yes.

17 Q. Yes? What time do you wake up in the morning, Marlo?

18 A. About 7:00.

19 Q. About 7:00?

11:39 20 A. Yup.

21 Q. And when do you eat breakfast?

22 A. 8:00.

23 Q. 8:00?

24 A. (Nods head.)

11:39 25 Q. And what do you do after breakfast?

1 A. Help Barb with the dishes.

2 Q. You help Barb with the dishes?

3 A. Yeah. Sometimes I make beds, too.

4 Q. Sometimes you make the beds?

11:39 5 A. Yeah.

6 Q. And what do you do after that?

7 A. Do some laundry.

8 Q. Do some laundry?

9 A. Watch TV, too.

11:39 10 Q. And watch TV too? What do you watch on TV?

11 A. Price is Right.

12 Q. Price is Right?

13 A. Golden Girls first.

14 Q. So you watch Golden Girls first and then Price is Right?

11:40 15 A. Game Show.

16 Q. And the Game Show?

17 A. Yeah.

18 Q. And then Price is Right.

19 A. Right.

11:40 20 Q. What time does Price is Right come on?

21 A. 10:00.

22 Q. Does it come on more than once a day?

23 A. (Nods head.)

24 Q. What's the second time it comes on?

11:40 25 A. At night.

1 Q. At night? What time at night?

2 A. 7:00.

3 Q. 7:00? Okay. Who is your favorite person on the Price is
4 Right?

11:40 5 A. Bob Barker.

6 Q. You like Bob Barker? All right.

7 A. There's a different guy, too.

8 Q. What's that?

9 A. There's a different guy in there, too. Drew Carey.

11:40 10 Q. A different guy in there too, Drew Carey?

11 A. Yeah.

12 Q. Okay. What do you do after Price is Right?

13 A. Watch my soap operas.

14 Q. You watch your soap operas?

11:40 15 A. Uh-huh.

16 Q. What soap operas do you watch?

17 A. Young and the Restless, Days of our Lives, and General
18 Hospital.

19 Q. Young and the Restless, Days of our Lives, and General
11:41 20 Hospital?

21 A. Yeah.

22 Q. Do you have a favorite?

23 A. Can't remember.

24 Q. You can't choose? Okay. When do you eat lunch? What time
11:41 25 do you eat lunch?

1 A. 11:30 or noon.

2 Q. 11:30 or noon? What do you do after lunch?

3 A. Watch my soap operas.

4 Q. So, it's like some before lunch and some after? Yes?

11:41 5 A. Yes.

6 Q. Do you like to watch baseball games?

7 A. The Packers.

8 Q. So you like football games.

9 A. And the Brewers.

11:41 10 Q. And the Brewers. Do you have a favorite player on the
11 Packers?

12 A. Rodgers.

13 Q. Rodgers?

14 A. Yeah.

11:42 15 Q. What do you like about Rodgers?

16 A. He's good.

17 Q. He's good? He's good.

18 Okay, Marlo. Are you ready to talk about when you
19 worked at Walmart?

11:42 20 A. I can't remember that.

21 Q. What's that? You said I don't want to -- okay, I'll ask you
22 a question. When you had a job at Walmart; right?

23 A. Right.

24 Q. Right. Okay. And at Walmart what department did you work
11:42 25 in?

1 A. Domestic. Domestics?

2 Q. And what was your job in domestics?

3 A. Helping people out.

4 Q. Helping people out.

11:42 5 A. Yup.

6 Q. Did you fold towels?

7 A. Yes. Sometimes I do returns too.

8 Q. Sometimes you do returns too?

9 A. Yeah.

11:43 10 Q. Yeah. Did you zone your area?

11 A. (Nods head.)

12 Q. Is that a nod yes? Zoning?

13 A. No.

14 Q. But you folded the towels?

11:43 15 A. Right.

16 Q. And you kept the aisles neat. Yes?

17 A. Yes.

18 Q. Did you like working at Walmart?

19 A. Yes.

11:43 20 Q. What did you like about working at Walmart?

21 A. I liked it.

22 Q. You liked it? What did you like about it?

23 A. That's a long time ago. I can't remember.

24 Q. A long time ago?

11:43 25 A. Yeah. Mom and dad were still alive yet.

1 Q. Mom and dad were still alive.

2 A. Yeah. Now I got my sister, Amy.

3 Q. Now you got your sister, Amy.

4 A. Yeah.

11:44 5 Q. But you remember that your mom and dad were still alive
6 then.

7 A. (Nods head.)

8 Q. Is that a yes? You remember your mom and dad were still
9 alive then.

11:44 10 A. Yeah.

11 Q. Okay. How did you get to work at Walmart?

12 A. Took the bus.

13 Q. You take the bus? Did you eat lunch at Walmart?

14 A. Yeah.

11:44 15 Q. Where did you eat lunch at the Walmart?

16 A. Subway.

17 Q. Subway?

18 A. Yeah.

19 Q. Do you remember what you used to order?

11:44 20 A. Can't remember.

21 Q. What do you like from Subway?

22 A. Chicken.

23 Q. Chicken?

24 A. Like a wrap.

11:44 25 Q. A chicken wrap?

1 A. Yeah.

2 Q. What time did you punch in at Walmart? Did you punch in
3 after lunch? Is that a yes?

4 A. First I leave.

11:45 5 Q. First you leave?

6 A. Yeah.

7 Q. When?

8 A. Can't remember.

9 Q. When you say first you leave, are you talking about when you
11:45 10 left at 4:00?

11 A. Yeah.

12 Q. Are you getting sad thinking about Walmart?

13 A. I leave about 4:00.

14 Q. You leave at 4:00?

11:45 15 A. Yeah, I take the bus home.

16 Q. You take the bus home.

17 A. Uh-huh.

18 Q. Did you have a noon to 4:00 schedule when you worked at
19 Walmart?

11:46 20 A. Noon to 4:00.

21 Q. Noon to 4:00. What time did the bus that you took home
22 leave Walmart? What time was the bus you took home?

23 A. I got home about 4:00.

24 Q. You got home about 4:00? What time did that bus get to
11:46 25 Walmart?

1 A. (No response.)

2 Q. Did the bus you took home get to Walmart after 4:00?

3 A. (Nods head.)

4 Q. Is that a yes?

11:46 5 A. Yes.

6 Q. I'm sorry. Can you put your hand down because we can't hear
7 you. Thank you, sweetheart.

8 A. Sorry.

9 Q. So the bus that you took home left about 4:00 from Walmart?

11:46 10 A. Yeah.

11 Q. Okay.

12 A. I remember now.

13 Q. You remember now?

14 A. Yeah.

11:46 15 Q. About 4:00?

16 A. I get home about 5:00.

17 Q. And you'd be home about 5:00.

18 A. I remember now.

19 Q. You remember now? Okay.

11:47 20 A. Yeah.

21 Q. And when you got home around 5:00, is that when you would
22 have dinner?

23 A. (Nods head.)

24 Q. Is that a yes?

11:47 25 A. Yes.

1 Q. Can you move up to the microphone for me, honey? Scooch up
2 a little bit.

3 A. Yes.

4 Q. Did you eat dinner with Barb, your sister Barb? Yes?

11:47 5 A. Yes.

6 Q. When you worked at Walmart did anyone tell you you had to
7 work past 4:00?

8 A. I can't remember.

9 Q. Do you remember if you asked anyone if you could leave at
11:47 10 4:00?

11 A. Yes.

12 Q. Yes? Who did you ask if you could leave at 4:00?

13 A. Karen.

14 Q. Karen? Is that Karen Becker?

11:48 15 A. Uh-huh.

16 Q. The HR lady?

17 A. Yup.

18 Q. Why did you ask to leave work at 4:00?

19 A. I can't remember though. Noon to 4:00.

11:48 20 Q. Noon to 4:00 is when you worked?

21 A. Yeah.

22 Q. But so that's why you asked to leave.

23 A. Right.

24 Q. Oh, okay. Because you work noon to 4:00. Do you still work
11:48 25 at Walmart?

1 A. No, I got fired.

2 Q. Who fired you?

3 A. Julia and Robin.

4 Q. Why?

11:48 5 A. I don't know what happened.

6 Q. You don't know what happened?

7 A. I told Amy about it.

8 Q. You told Amy about it?

9 A. Yup.

11:49 10 Q. What did you tell Amy?

11 A. She knows about it already.

12 Q. Can you tell us what you told Amy? She knows about it

13 already I know, but can you tell us what you told Amy?

14 A. Yeah, she knows. I can't remember.

11:49 15 Q. You can't remember exactly what you told her?

16 A. No.

17 Q. That's okay. So you said Julie and Robin fired you.

18 A. And Debbie too.

19 Q. And Debbie too.

11:49 20 A. Yeah.

21 Q. What did they say when they fired you?

22 A. I walked back to take the bus.

23 Q. That you walked back to take the bus, that's what they said?

24 A. Yes.

11:49 25 Q. Did they say anything else?

1 A. Nothing. I walked out.

2 Q. You walked out to take the bus?

3 A. Yeah.

4 Q. The bus that you took home every day.

11:50 5 A. About 4:00 something.

6 Q. About 4:00 something?

7 A. Yeah, at 4:00.

8 Q. That was your bus? Yeah?

9 A. Yes.

11:50 10 Q. After you got fired that day did you take that bus home?

11 A. Yes, I did.

12 Q. Yes, you did? Yes, you did you said? What time was that

13 bus, the bus that you took home the day you got fired?

14 A. About 2:00 something.

11:50 15 Q. It was -- oh, you think?

16 A. About 2:00.

17 Q. Did you get fired before the end of your shift?

18 A. Yeah.

19 Q. Oh. When you got fired how did it make you feel?

11:50 20 A. Upset.

21 Q. Upset?

22 A. Yup.

23 Q. Why were you upset?

24 A. I told mom and dad about that.

11:51 25 Q. You told your mom and dad about that?

1 A. They were still alive yet.

2 Q. When they were still alive.

3 A. Yeah.

4 Q. What did you say to mom and dad about it?

11:51 5 A. Upset.

6 Q. Is that you were upset.

7 A. Yup.

8 Q. Why were you upset?

9 A. I missed my job.

11:51 10 Q. You miss your job? I'm sorry.

11 Did you cry when Walmart fired you?

12 A. Yes, I did.

13 Q. Yes, you did?

14 A. Barb saw me crying.

11:51 15 Q. Barb saw you crying. I'm sorry. Are you still sad when you
16 think about getting fired by Walmart?

17 A. Yes, I do.

18 Q. Yes? You do?

19 A. Yeah. Yeah.

11:51 20 Q. Does it make you sad when you see a Walmart truck? Yeah?

21 A. Yeah.

22 Q. What do you feel when you see a Walmart truck?

23 A. I can't remember.

24 Q. It just makes you sad?

11:52 25 A. Right.

1 Q. Does it make you sad when you see Walmart on TV?

2 A. My sister gets sad too.

3 Q. Your sister gets sad too when she sees Walmart on TV?

4 A. Yeah.

11:52 5 Q. You said you missed your job, what do you miss about working
6 at Walmart?

7 A. Can't remember. It's a long time.

8 Q. You can't remember anything in particular? Do you remember
9 what you liked about your job?

11:52 10 A. I liked it.

11 Q. That you liked it.

12 A. Yeah.

13 Q. That's what you remember. Did you like meeting people?

14 A. Yeah.

11:52 15 Q. Did you like helping the customers?

16 A. Yes.

17 Q. Did you like doing returns?

18 A. Yes.

19 Q. What else did you like?

11:53 20 A. Sometimes I put stuff away on the shelves.

21 Q. Sometimes you put the stuff away on the shelves?

22 A. Yeah.

23 Q. You liked that.

24 A. Yeah.

11:53 25 Q. Marlo, do you want your job back?

1 A. Yes.

2 Q. Yes? Why do you want your job back?

3 A. I miss it, miss all the people.

4 Q. You miss all the people? Yeah. Is there anything else you
11:53 5 want to say to us about Walmart?

6 A. That I miss everybody.

7 Q. You miss everybody? Okay.

8 I don't have any more questions for you right now.
9 Walmart's lawyers might have some questions for you, okay? So
11:54 10 stay put and I'll come back and get you when we're done, okay?
11 All right.

12 THE COURT: Go ahead, Mr. Harlan.

13 CROSS-EXAMINATION

14 BY MR. HARLAN:

11:54 15 Q. Good morning, Ms. Spaeth, you remember me from our
16 deposition a couple years ago? Would you like me to come near
17 you?

18 A. If you want to.

19 Q. How have you been doing? Do you recognize me from our
11:54 20 deposition a couple years ago? We had a nice conversation,
21 didn't we?

22 A. Yes.

23 Q. I promise you, I'm just going to ask you a few questions,
24 okay?

11:54 25 A. All right.

1 Q. So in terms of the teams that you like, I didn't hear
2 anything about the Bucks, you don't like the Bucks?

3 A. The Bucks I like.

4 Q. Okay. They're doing well this year.

11:55 5 A. The Packers does.

6 Q. Okay. And the Brew Crew.

7 A. And the Brewers I like a lot.

8 Q. So one of the things that counsel for the EEOC didn't ask
9 you about that we talked about at your deposition was all the
11:55 10 activities that you liked to do. Like I remember you telling me
11 about bocce ball. I can barely pronounce it. But that's
12 something that you told me at the deposition that you really
13 liked to do; right?

14 A. Yup.

11:55 15 Q. And are you still doing that today?

16 A. No.

17 Q. And you also told me about the Special Olympics; right?

18 A. Yes.

19 Q. And are you still involved in Special Olympics?

11:55 20 A. Yup.

21 Q. Tell the jury and Judge Griesbach what you like to do with
22 the Special Olympics.

23 A. I do bocce ball. Bowling. Swimming.

24 Q. Does Barb do bowling as well?

11:55 25 A. Yeah.

1 Q. Who is better, you or Barb?

2 A. Both.

3 (General laughter.)

4 BY MR. HARLAN:

11:56 5 Q. We may be seeing Barb later so I'll keep that between you
6 and us.

7 A. Okay.

8 Q. So I just had really a couple more questions and then I'm
9 going to let you get on with your day. Thank you very much for
11:56 10 spending time with us and helping us understand your perspective
11 in this case.

12 A. Okay.

13 Q. Counsel asked you about your time at Walmart and I
14 understand you miss the people there. She also asked you about
11:56 15 your schedule and you said it was noon to 4:00, but you remember
16 at some point your schedule changed to 1:00 to 5:30; correct?

17 A. Yes.

18 Q. And you mentioned Robin and Julie, those were people who
19 were managers.

11:56 20 A. Julie too.

21 Q. Do you remember at some point they told you that you were
22 going to get in trouble if you left early?

23 A. Robin. And Debbie.

24 Q. Okay. And we're going to hear from your roommate. You have
11:57 25 a good relationship with Barbara, don't you?

1 A. Yes.

2 Q. Would you say she's probably somebody who knows you better
3 than anybody in the world at this point?

4 A. Can't remember.

11:57 5 Q. You like her, don't you?

6 A. Yeah.

7 Q. And when you had to work later was there a point in time
8 where she told you she wasn't happy with you working later
9 because of supper having to be later?

11:57 10 A. I can't remember that one either.

11 Q. Why don't we just play a little clip from your deposition.
12 Do you remember when we were at your deposition we had someone
13 there recording it like on TV? Do you remember that?

14 So I'm just going to play a little bit of your
11:58 15 deposition and then I'm going to sit down and let you go about
16 your day.

17 So deposition pages 97 through 98, lines 25 through
18 16.

19 THE COURT: And can she see it on the screen there if
11:58 20 she wants?

21 MR. HARLAN: Yes. Thank you very much, Judge. You
22 can turn and look there if you want to look.

23 MS. CARTER: Can you give us a moment to review the
24 lines really quick?

11:58 25 MR. HARLAN: Yeah. So it's 97 through 98. Lines 25

1 through 16.

2 BY MR. HARLAN:

3 Q. So we're going to play a little bit from that deposition
4 where we had a conversation about Barbara and you having to come
12:00 5 home later and just have you look at it. So I'm on 97 through
6 98, lines 25 through 16.

7 MR. HARLAN: Go ahead, Tracy.

8 TECHNICIAN: We are currently having some audio
9 problems. The audio is not working.

12:01 10 MR. HARLAN: Okay.

11 TECHNICIAN: Hold on one second, please, Emery.

12 THE COURT: Perhaps you could read the transcript?
13 Maybe that would be faster.

14 MR. HARLAN: Yes, sir.

12:01 15 So these were questions that I asked you and answers
16 that you gave me at your deposition:

17 "Did your stepsister Barbara ever tell you that she
18 was not happy with you -- not happy that you were coming home
19 late for supper?

12:01 20 "ANSWER: Yeah.

21 "And do you recall when she told you that, was it
22 while you were still working at Walmart?

23 "ANSWER: Yeah.

24 "QUESTION: And did she say why she wasn't happy when
12:02 25 you were coming home late?

1 "ANSWER: (Witness nods head.)

2 "QUESTION: Did she tell you why she was upset about
3 that?

4 "ANSWER: Right.

12:02 5 "And what did she say, if you remember?

6 "Barb's not too happy with me like that.

7 "QUESTION: Okay.

8 "I get home and she started eating already. Except
9 the bus is late sometimes, too."

12:02 10 Ms. Spaeth, thank you very much for taking time to be
11 with us today. I have no further questions for you.

12 THE COURT: Do you have follow-up?

13 MS. CARTER: No further questions from the plaintiff,
14 Your Honor.

12:03 15 THE COURT: Okay. Well, thank you, Marlo. You can
16 step down.

17 (Witness excused at 12:03 p.m.)

18 THE COURT: We'll take our noon recess. Let's aim for
19 1:15. Okay? 1:15 we'll start up.

12:03 20 (Jury out at 12:03 p.m.)

21 THE COURT: Okay. Okay. Anything to put on the
22 record before we break?

23 MR. HARLAN: No, sir.

24 MS. VANCE: We do actually real quick need to move
12:04 25 into evidence the stipulated -- the stipulation regarding

1 financials which is Exhibit 41. There was a ruling and we just
2 hadn't made the motion prior.

3 THE COURT: You object to the relevance of it but you
4 don't object to the stipulation that given my ruling they can
12:04 5 use the financial information, it's authentic. Is that a fair
6 statement?

7 MR. HARLAN: Yes, Your Honor.

8 THE COURT: So the exhibit then -- and this is exhibit
9 what again?

12:04 10 MS. VANCE: 41.

11 THE COURT: 41 is received.

12 (Exhibit 41, Stipulation regarding Financials,
13 received in evidence.)

14 MS. VANCE: Thank you.

12:04 15 THE COURT: Okay.

16 MS. VANCE: And then, Your Honor, we anticipate having
17 offers of proof at the end of our case-in-chief. We are about
18 to call our last witness when we return from lunch.

19 THE COURT: Who is that?

12:05 20 MS. VANCE: Dr. Smith, the expert witness, Your Honor.

21 THE COURT: Okay. And then you wish to do an offer of
22 proof on --

23 MR. HARLAN: On what?

24 MS. VANCE: On Exhibits 42 and -- 42 is the Stern
12:05 25 evaluations and then the two attendance records, Your Honor.

1 THE COURT: Okay.

2 MR. MULAIRE: So these are just to formalize what we
3 think they would show if we were allowed to use them.

4 THE COURT: Okay.

12:05 5 MR. MULAIRE: Perhaps we could do that before the jury
6 comes back in, after lunch.

7 THE COURT: That's possible. Okay. 1:15 I told the
8 jury to be back, maybe 1:00 for us?

9 MS. VANCE: Thank you, Your Honor.

12:05 10 THE COURT: Okay. We're in recess then.

11 (Recess taken at 12:05 p.m., until 1:12 p.m.)

12 THE COURT: Okay. Be seated. The record should
13 reflect that counsel are here but we are outside the presence of
14 the jury.

01:13 15 Mr. Mulaire?

16 MR. MULAIRE: Thank you, Your Honor. I realized that
17 we would not take 15 minutes. We have two quick offers of proof
18 and a short procedural question about what pageantry is needed
19 for expert witnesses.

20 DEFENSE OFFERS OF PROOF

21 MR. MULAIRE: So, first the offers of proof. And this
22 is -- we recognize that we discussed a lot of this off the
23 record in chambers, we just wanted to make sure that we have a
24 couple of things on the record.

01:13 25 First, if permitted to use Plaintiff's Exhibit 42,

1 which is the performance appraisals of Ms. Stern, we would offer
2 those because they indicate that Ms. Stern "needs to be more
3 compassionate when dealing/addressing associate concerns or
4 issues and be more understanding of situation" and "needs to be
01:13 5 more understanding and compassionate when dealing with
6 associates' feelings."

7 That's Exhibit 42.

8 Separately, if permitted to use Exhibits 25 and 27,
9 which are the attendance records of Ms. Moss and Ms. Becker, in
01:14 10 addition to using those exhibits we would have also examined
11 Ms. Becker about her attendance and we anticipate that she would
12 have testified that she departed early on many occasions over
13 the years such as when work was slow or completed early; that
14 this was with management's approval, but that it occurred
01:14 15 without incident and that it did not render her unqualified to
16 work at Walmart.

17 So those are our offers of proof.

18 THE COURT: Okay. Does Walmart counsel have any?

19 MR. HARLAN: Judge, when we were in chambers we --

01:14 20 THE COURT: Keep in mind, chambers wasn't on the
21 record.

22 MR. HARLAN: Okay. So we have I think submitted on
23 Sunday -- yeah, I think it was Sunday -- well, maybe it was
24 Saturday, the days are blending together. We submitted the
01:15 25 arguments in support of excluding those documents.

1 With respect to Ms. Stern, that is classic character
2 evidence that has no place in this case. And, in addition, it
3 should be excluded under 403 which I think is what the Court
4 concluded.

01:15 5 And likewise, with respect to the attendance records
6 of the individuals, Ms. -- I can't remember both the
7 individuals' names right now, but the individuals who counsel
8 cited are not similarly situated. And getting into the nuances
9 of why they would have departed is really not relevant to the
01:15 10 claims here, especially since a number of the departures at
11 issue were approved in the sense that they went to their manager
12 and said that they needed to leave or the manager asked them to
13 leave. And so what we're dealing with in this case as it
14 relates to Ms. Spaeth is unauthorized early departures and
01:16 15 absences.

16 THE COURT: Okay. Yeah, the record should reflect we
17 have had discussions in chambers. And I think we've discussed
18 this to some extent on the record at pretrial and since.

19 42 I've concluded is not specific. It's general
01:16 20 performance reviews, it's not specific as to any conduct by
21 Ms. -- Stern, is it? -- in relation to Ms. Spaeth. It's a
22 general comment that she needs to be more compassionate and
23 consider the feelings of associates. And I think to use a
24 general performance review in this fashion would be unduly
01:16 25 prejudicial. I think the potential probative value is far

1 outweighed by the danger of unfair prejudice. I think it would
2 encourage employers not to be candid in assessments and fear
3 that they would be used against them, even general comments of
4 any specific claim and I think that's one of the dangers.

01:17 5 But more importantly, then we're going to be back here
6 talking about, you know, what the basis of these comments were,
7 assuming they're not specific to Ms. Spaeth, and it just seems
8 to me that the potential for unfair prejudice and going off into
9 tangents would outweigh any potential probative value.

01:17 10 With respect to the attendance records, these are
11 employees -- first of all, it's a period that's between six and
12 eight years before the termination here, as I understand it, or
13 a lengthy period earlier, and there are employees who are in the
14 back office who were not doing customer service. Ms. Spaeth was
01:17 15 a sales associate.

16 When the store was working -- in fact, the change in
17 schedule was based on the computer showing of customer traffic.
18 And even one of the notes that you went over earlier today
19 indicates that when she wasn't there, you know, when she leaves
01:18 20 the aisles get messy. Customers take things, they put them
21 elsewhere, and that was her job to help customers when they're
22 there and to straighten out after customers move things around.
23 The two employees were back-office employees doing things like
24 scheduling or payroll or something or other.

01:18 25 And most important of all, those were absences or

1 leaving early -- I shouldn't say they were absences, they were
2 leaving early with the authorization of the company. And here
3 these were unauthorized leaving early. So I think it's really
4 apples and oranges completely. And it would again -- not only
01:18 5 is it irrelevant, but it would violate Rule 403 to have that
6 evidence in. It would -- it's prejudicial. It would require
7 lengthening the trial to explain the differences and end up
8 possibly confusing the jury.

9 So your record's made on those offers of proof, but my
01:19 10 ruling remains.

11 And we're working on instructions. Hopefully before
12 the end of the day we'll give you our version, which is a
13 compilation of what you sent, and we'll have those later.

14 You have one more witness; is that right?

01:19 15 MS. VANCE: Yes, Your Honor. The last witness would
16 be our expert witness. Does this court require a motion after a
17 voir dire?

18 THE COURT: No, unless -- we've dealt with the *Daubert*
19 issue, so that's preserved. And I think they can preserve that.
01:19 20 But if you want to make another objection I don't care.

21 But I'm not going to -- I don't pronounce your witness
22 an expert. I rely on you to lay a foundation for him to
23 introduce or offer evidence that is admissible under Rule 701 or
24 2, whatever the expert --

01:20 25 So as long as you lay the foundation and there's no

1 objection, with the understanding that I think the *Daubert*
2 issue, you want that preserved and certainly the defendants have
3 challenged the admissibility of this evidence. So that's a
4 matter of record as well.

01:20 5 MR. MULAIRE: And actually, since Your Honor raised
6 it, can I just ask, is the Court's intention then to have a
7 charging conference at the end of the day today, or are we just
8 getting a draft and we'll plan on talking tomorrow?

9 THE COURT: I would rather give you a draft, let you
01:20 10 look it over, formulate your ideas.

11 MR. MULAIRE: We would rather that, too.

12 MS. CARTER: Thank you, Your Honor.

13 THE COURT: Are you ready to go, Walmart, at the end
14 of this? We can recess. I take it Dr. Smith will be some
01:20 15 length?

16 MS. VANCE: Yes, Your Honor.

17 THE COURT: And then we'll take a break.

18 MR. HARLAN: We've notified the agency that we plan on
19 calling Barbara Barnes and they've accepted responsibility for
01:20 20 getting her here. So Barbara Barnes will be our first witness.
21 And then we also have our second witness I think here as well.

22 THE COURT: Do you think you're going to be able to
23 get through your evidence by tomorrow?

24 MR. HARLAN: It's going to be tight, but we're going
01:21 25 to give it our best.

1 THE COURT: Good. Let's bring in the jury. We always
2 like to finish early if we can around here, but we don't want to
3 cut anyone off.

4 (Jury in at 1:21 p.m.)

01:22 5 THE COURT: Okay. Go ahead, be seated. You saw
6 Ms. Spaeth just trip as she went out, I just want you to know
7 she's fine, she's okay. It was just I think the step caught her
8 off guard.

9 Okay. You may call your next witness then.

01:23 10 MS. VANCE: Thank you, Your Honor. Plaintiff calls
11 Dr. David Smith.

12 THE COURT: If you would raise your right hand the
13 clerk will administer the oath.

14 DAVID SMITH, M.D., PLAINTIFF WITNESS, DULY SWORN

01:24 15 THE CLERK: Please state and spell your first and last
16 name for the record.

17 THE WITNESS: David, D-a-v-i-d, S-m-i-t-h, middle
18 initial is S as in Sam.

19 THE COURT: Thank you, Dr. Smith.

01:24 20 Okay. Are you ready to go?

21 THE WITNESS: Yes, I am. I'm sorry, I forgot to turn
22 my phone off.

23 THE COURT: That's good you did it now.

24 Go ahead, Ms. Vance, you may proceed.

25

DIRECT EXAMINATION

BY MS. VANCE:

Q. What is your occupation?

A. I'm a medical doctor.

Q. What professional degree do you hold, Dr. Smith?

A. I have an M.D. which stands for medical doctor, and my field is family medicine.

Q. What certifications do you hold?

A. I have -- besides the M.D., I'm a member of the American

Board of Family Medicine. I am board certified.

Q. How long have you been board certified in family medicine?

A. Close to 40 years. 38 years I think.

Q. Dr. Smith, what is your area of expertise?

A. Well, many years ago I decided I wanted to work more with people with Down syndrome, so that's been my area.

Q. And have you focused your medical practice on treating patients with Down syndrome?

A. Yes. Yes. I like to think that it's very similar that I accept that people with Down syndrome have some special needs, but they still are people and they need to be taken care of.

Q. And, Dr. Smith, what is the clinic that -- what's the name of the clinic that you treat patients with Down syndrome in?

A. Down Syndrome Clinic of Wisconsin, founded in 1996. Right now it's at Children's Hospital.

Q. And you were the founder; is that correct?

1 A. Correct.

2 Q. And the program director for many years; is that right?

3 A. Correct.

01:26 4 Q. And I'll ask to have what's been admitted into evidence as
5 Exhibit 38 published.

6 (Exhibit 38, Dr. David Smith CV - 2018, admitted
7 previously by stipulation.)

8 BY MS. VANCE:

01:27 9 Q. And, Dr. Smith, can you either look at Exhibit 38 in the
10 binder in front of you or we could see it on the screen.

11 MS. VANCE: And can we first get the first page,
12 please?

13 THE WITNESS: Almost there. Okay. The curriculum
14 vitae?

15 BY MS. VANCE:

16 Q. Yes. So what is Exhibit 38, Dr. Smith?

17 A. It's my curriculum vitae or resume. And it's in medical
18 school format so it's kind of long.

01:27 19 Q. And this is a record of your scholarly research; is that
20 right?

21 A. Yes, and my practice.

22 Q. Okay. And I'll ask to turn to page 10. And I see you have
23 peer-reviewed publications in the area of Down syndrome.

24 A. Correct.

01:28 25 Q. Is that correct? And I see you have a peer-reviewed journal

1 article in the American Journal of Medical Genetics?

2 A. Correct.

3 MS. VANCE: And if I could have Lectrice turn to
4 page 10, please.

01:28 5 BY MS. VANCE:

6 Q. Okay. Dr. Smith, do you also attend national conferences?

7 A. Yes, I do.

8 Q. Okay. And I'll direct your attention to the tenth page
9 of -- there we go. I see it now. The tenth page of your
01:29 10 curriculum vitae or your resume, I see that you had a
11 presentation at the Down Syndrome Medical Interest Group USA.
12 Can you tell us what that group is, please?

13 A. Yes, also known as DSMIG for short. It's national, but
14 there are also international branches of it, and it's somewhere
01:29 15 between two and 300 professionals in the medical field. Most of
16 them are physicians, but also other therapists, PT, OT. Speech,
17 nutrition. The focus is improving the health care for people
18 and families with Down syndrome.

19 Q. And then I see your presentation was called "Dementia and
01:29 20 Down Syndrome Clinic Survey;" and I'm just going to ask is that
21 a research focus that you've had, the subject of dementia and
22 Down syndrome?

23 A. Yes. I'm on the -- they have some committees and one of
24 them has to do with dementia. And I did the survey.

01:30 25 Q. Dr. Smith, can you pull yourself a little closer to your

1 microphone?

2 A. Yes.

3 Q. Thank you. Well, I'll ask you then to educate us,

4 Dr. Smith. What is Down syndrome?

01:30 5 A. Well, Down syndrome is a medical condition that -- a genetic
6 condition. And most of us have pairs of chromosomes, so 46 in
7 pairs, 23 pairs. And on the 21st chromosome for people with
8 Down syndrome they have an extra chromosome. It happens on some
9 others, but they are what we call lethal, they don't survive.

01:30 10 Q. Dr. Smith, how does that extra chromosome affect a person
11 with Down syndrome?

12 A. Well, it gives them certain physical characteristics so that
13 you can often recognize them on the street. Certain facial
14 characteristics, the bridge of the nose, smaller eye shape.
01:31 15 Their tongue is usually larger so sometimes it protrudes a
16 little bit.

17 There are some other findings that are not as easily
18 seen in the hands and the feet. And then there are a number of
19 medical conditions that they get much more commonly than other
01:31 20 people do. There are actually a few that they don't tend to get
21 also, but generally we're most concerned about the ones that
22 they do get.

23 And then they also have certain personality
24 characteristics, for the most part. Nothing's 100 percent for
01:32 25 anything. But most people with Down syndrome are not very good

1 auditory learners. In other words, they don't -- talking to
2 them doesn't work as well as visual or demonstrating something.

3 They tend to -- the term "people pleaser" is often
4 used. They like -- they don't like conflict in particular, so
01:32 5 they do try to please others. Now, there are some days when I'm
6 sure their parents don't feel that way, but in general that's
7 the case.

8 Q. Dr. Smith, I heard you describe a lot of physical
9 characteristics of people with Down syndrome, could you also
01:32 10 describe mental characteristics?

11 A. Sure. And that's probably one of the most prominent ones
12 once things get rolling. They have cognitive delays. Generally
13 we think of them as mild to moderate, but still that puts them
14 in the -- if you met them on the street or something or you
01:33 15 interacted with them, you'd probably think they behaved like a
16 four-year-old or maybe a 10- or 11-year-old, in that range. And
17 that's pretty typical.

18 Now, there are some that are severely affected and
19 will have severe cognitive disabilities. Speech tends to be
01:33 20 difficult for them also.

21 Q. And I heard you talk about an age range of four years to
22 about 10 or 11 years. In the medical literature do you call
23 that developmental delays?

24 A. Developmental delays, yes.

01:33 25 Q. So is it fair to say developmentally a person with Down

1 syndrome is probably in the developmental age range of four
2 years to a 10- or 11-year-old?

3 A. Yes, generally. There are exceptions, but generally.

4 Q. And in your practice at the Down Syndrome Clinic of
01:34 5 Wisconsin, what types of issues do you address for your
6 patients?

7 A. Well, when I first started the clinic I saw kids and adults,
8 but as time went on it was all adults and I had a pediatrician
9 for the kids.

01:34 10 But besides looking at general health care, the most
11 common problem that they came in with was for loss of ability.
12 They were having trouble with something, either how to function
13 at work or at home, or if they're volunteering, some kind of
14 interaction with people that they were having trouble with.

01:35 15 Q. And in your experience did you find a common link to these
16 problems that your patients would have of having -- experiencing
17 a loss of function?

18 A. Well, a common link in the sense that it was one of their
19 medical problems, but they oftentimes would come in with a
01:35 20 diagnosis. Sometimes they would say they had anxiety or
21 depression, sometimes -- and quite frequently actually they'd
22 come in with a diagnosis of dementia.

23 And unfortunately, a couple decades ago some doctors,
24 pathologists on Long Island examined the brains of deceased
01:35 25 adults with Down syndrome, and all of them over the age of 35

1 had signs of dementia on the biopsy. And that got widespread in
2 the medical community. Everybody said if they're 35 and there's
3 a problem they have dementia.

4 The next year they came out with another article and
01:36 5 said but they don't all have dementia just because they have
6 those plaques. And we are now learning that there are some
7 other things involved besides just the plaques and tangles. And
8 so not all of them get dementia. And that was a problem because
9 the person has a problem we're going to say they have dementia,
01:36 10 it's just too easy to do.

11 Q. I wanted to ask you, Dr. Smith, if you could talk about
12 routine for people with Down syndrome.

13 A. Yes. We all to a certain extent need some routine to order
14 our day. You know, we get up, we usually eat breakfast, we go
01:37 15 to work, that sort of thing. It simplifies things.

16 For people with Down syndrome it's especially
17 important to have some routine. It makes their day much more
18 manageable. And if you take away that routine, that often
19 causes a great deal of stress for them.

01:37 20 Q. Then I'll focus your attention on the issue of employment.
21 Are you -- in your practice have you treated a lot of patients
22 with Down syndrome who are in the workforce?

23 A. A fair number. I don't know the exact numbers, but either
24 work or volunteer. And, yeah, they're generally considered good
01:37 25 employees because they like routine. So if the task is not

1 developmentally or technically difficult and they can learn it,
2 they follow the book. They do it just a certain way. And
3 they're usually very good and timely in terms of their work
4 schedule.

01:38 5 Q. And as far as the issue of attendance, how would you say an
6 employee with Down syndrome, how that condition would typically
7 impact attendance?

8 A. As I was saying, generally very good attendance. And the
9 things that are written support my statement too that they are
01:38 10 generally good at attendance. Or with attendance.

11 Q. And is that connected to routine?

12 A. I think so. Yeah.

13 Q. Okay. And then I'll direct your attention specifically to
14 Marlo Spaeth.

01:38 15 A. Sure.

16 Q. How did you first learn of Marlo Spaeth?

17 A. Well, Terry, my clinic coordinator and I were sitting in the
18 office, and I don't know if she read the article or told me
19 about it or I saw it, probably she brought it to my attention,
01:39 20 and I said, well, that's interesting, that sounds like it might
21 be something that we would see in our clinic.

22 So, I don't know why, normally I try to keep my nose
23 out of the news, but I was fired up for some reason so I gave
24 you guys a call and said that I would be willing to look into it
01:39 25 to see what I could find.

1 Q. And, Dr. Smith, once you did become involved in the case
2 what did you do?

3 A. Well, I wanted to see exactly what was going on. So we got
4 old records, medical records and we had Marlo make an
01:40 5 appointment. Was that 2017 I think? At any rate, she came in
6 for an appointment and then I did an evaluation.

7 Q. And aside from reviewing old medical records did you also
8 review some history from her employment at Walmart?

9 A. Yes. I can't tell you the exact timeframe in which I did
01:40 10 that, those different reviews, but, yes, they were reviewed.

11 Q. Okay. And I'll ask you to turn to Exhibit 39.

12 (Exhibit 39, Dr. David Smith Office Visit - 12/8/201,
13 admitted previously by stipulation.)

14 MS. VANCE: And I'll ask Lectrice to publish
01:40 15 Exhibit 39, please.

16 BY MS. VANCE:

17 Q. Are you ready?

18 A. Yes.

19 Q. Dr. Smith, what is Exhibit 39?

01:40 20 A. That's my visit note from December 8th, 2017.

21 Q. Okay.

22 A. From my office visit with Marlo.

23 Q. Okay. I'm sorry, did I stop you from water? Did you need a
24 drink?

01:41 25 A. I'll get it. Thank you, though.

1 Q. Okay. So when Marlo came to your office as your patient,
2 who was with her?

3 A. Her sister, Amy Jo.

4 Q. And when you gathered information to examine Marlo and to
01:41 5 form your opinion, can you describe for us maybe like the order
6 of people you addressed in your office visit and how you did
7 that?

8 A. I, of course, say hello to everybody. And often the person
9 without Down syndrome starts to talk and wants to do everything,
01:42 10 and I just tell them sit tight, I'm here to see in this case
11 Marlo.

12 And there's a couple reasons for that. One is I want
13 to know what they have to say. And the other is that I want to
14 know how they -- what their speech is like, how they behave, how
01:42 15 they interact with me. And so then I take a history from her
16 first and then we go from there.

17 Q. And so when we look at Exhibit 39 and we see a history of
18 present condition that's largely information you gathered
19 directly from Marlo?

01:42 20 A. For the most part, yes. But, you know, a lot of the
21 details, of course, came from Amy Jo and then looking at the
22 records.

23 Q. And can you go through Exhibit 39 and explain to us some of
24 the reports Marlo Spaeth made to you?

01:42 25 A. Yes. Well, I would usually ask if she knows why she's here

1 and she said something about Walmart.

2 And then shortly thereafter there was something about,
3 and I put it in quotes because they were her words, "every day
4 is a bad day." And she was referring to since her termination.

01:43 5 There was also reference from -- I'm assuming it was
6 Amy Jo about self-talk. Self-talk is where people who are just
7 sitting around and they're talking to themselves, they're
8 talking to the air or whatever it is. And it's often used, we
9 think, to help people think things through, but also to relieve
01:43 10 some stress. And everybody does it to some extent. As we get
11 older we learn not to do it otherwise you get locked up for
12 doing it, but self-talk is a common thing.

13 Q. Okay.

14 A. And then "coming more" means that something was stressing
01:44 15 her.

16 Q. Okay. And I'll ask that we go to the third page of
17 Exhibit 39 with the assessment. To a reasonable degree of
18 medical certainty what is your expert opinion of the diagnosis
19 of Marlo Spaeth?

01:44 20 A. Well, at the time I thought that anxiety and depression were
21 the most likely issues and not dementia. Earlier she was
22 diagnosed with dementia, by telephone. And so they called up
23 and the nurse practitioner -- and physicians do this too, no
24 disparagement to nurse practitioners at all -- and said she must
01:45 25 have dementia because of the diagnostic overshadowing that I

1 talked about. And they started her on Aricept which is a
2 treatment for dementia.

3 Q. And that was at the time based on symptoms of memory loss;
4 right?

01:45 5 A. Correct, by telephone.

6 Q. Can symptoms of memory loss in people with Down syndrome
7 actually be a depressive symptom?

8 A. Yes. And in the general population, too. People who are
9 depressed may have more trouble recalling things.

01:45 10 Q. And when I look in your paragraph 2 I see pseudodementia, is
11 that related?

12 A. Yes. There are certain conditions that can look like
13 dementia, and so pseudodementia, they look like dementia. In
14 the general population in elderly people if they become
01:46 15 depressed sometimes they look like they have dementia and that's
16 called pseudodementia.

17 In people with Down syndrome there are a number of
18 things that can do that: Depression and anxiety. Unrecognized
19 thyroid problems. Pain. Pain can come from arthritis which is
01:46 20 more common in people with Down syndrome. It can come from
21 migraine headaches so family history often points us in that
22 direction. They might have TMJ problems so, you know, jaw,
23 joint, arthritis.

24 I've had one -- I shouldn't laugh, but she was 28, and
01:46 25 she was diagnosed with probable dementia because she was no

1 longer able to work in the family store. She no longer
2 volunteered at the church, lost a lot of weight, no longer
3 cleaned in the house and that sort of thing. And they thought
4 it was dementia. But on careful examination it turned out that
01:47 5 she had gallbladder disease. And gallbladder, if any of you
6 have had it, causes pain. And sometimes it's, you know, it just
7 hits you and you know something bad is going on. But other
8 times it will be a little bit pain here, little pain there, a
9 little pain there. And that's what was happening to her and she
01:47 10 didn't know what was going on, she just knew that something was
11 hurting her so she shut down.

12 Q. So it sounds like this pseudodementia is a misdiagnosis that
13 happens to people with Down syndrome because their symptoms look
14 like they're starting to lose their memory, they're starting to
01:47 15 lose their mental faculties.

16 A. Right, and there's some physical or mental stress that is
17 causing them to --

18 Q. And so I heard you say diagnostic overshadowing?

19 A. Correct.

01:48 20 Q. And is that related to this pseudodementia issue?

21 A. Yes.

22 Q. And explain diagnostic overshadowing?

23 A. Again, it's because they were -- this information came out
24 that everybody with Down syndrome had dementia; everybody over
01:48 25 the age of 35 that if there was a problem that looked a little

1 bit like dementia then they called it dementia. It was quick,
2 but not accurate.

3 Q. To a reasonable degree of medical certainty, is the fact
4 that Marlo Spaeth has Down syndrome connected to her need for a
01:48 5 predictable routine?

6 A. Yes.

7 Q. And then -- and could you explain a little bit more about
8 how that played out in your opinion in Walmart.

9 A. Well, like I said, she -- people with Down syndrome tend to
01:49 10 like routine. It makes their life predictable. And she had
11 been doing that job for 15 years. She was reliable with it.
12 She got raises. She was just -- you know, really a lot of pats
13 on the back. So she was doing a really good job. And she was
14 following a routine. She was able to tell me the routine she
01:49 15 had that day that I saw her, and this was a few years later, a
16 couple years later after she left there. So she had that
17 routine down and that was taken away from her. Now, I did want
18 more information and over time I got that information that
19 confirmed that.

01:50 20 Q. In your opinion is it likely that the fact that Marlo has
21 Down syndrome impacted her response to disciplinary actions by
22 Walmart?

23 A. Yeah. Yes. She -- you know, she went into these
24 conferences about her actions and they told her what she was
01:50 25 doing wrong.

1 And then she -- again, part of the -- I think I
2 mentioned earlier about pleasing people, people pleasing, she --
3 her response would be to say yes to almost anything. She wanted
4 to be positive, she wanted to get a good feeling from them. And
01:51 5 so, yes, I think so.

6 Q. And then I'll ask you in your practice, in your experience
7 but also in your medical opinion, can people with Down syndrome
8 adapt to big changes in routine?

9 A. Well, it depends on what you mean by big, but, yes, to some
01:51 10 extent they can. The easiest thing would be to try to adapt the
11 routine that they already have to whatever that new thing is.
12 But with help and someone to kind of show them the way using not
13 so much verbal but visual things, we use picture books, for
14 example, a lot of times to help. I don't but the people that I
01:52 15 work with. I'm in the luxury position of being able to say
16 here's the problem now fix it. But so they often will do
17 picture books and lay out the steps that are involved.

18 And if I may, I understood from one of the records
19 that for one day they used a job coach and she did -- she seemed
01:52 20 to do pretty well that day. And then they took that away and
21 she went back to her old schedule. She could still do the job,
22 it was just the schedule was wrong.

23 Q. Dr. Smith, have you reviewed any other examinations of Marlo
24 Spaeth for this case?

01:52 25 A. Examinations -- well, the -- Walmart had a psychologist. I

1 also looked at the medical records from Ms. Kaminski, the nurse
2 practitioner.

3 Q. I'll direct your attention to Walmart's expert, the
4 psychologist.

01:53 5 A. Okay.

6 Q. And who was that expert?

7 A. Dr. Thompson I think is the name.

8 Q. And what is Dr. Thompson's field?

9 A. He's a I think a child psychologist. He's a psychologist.

01:53 10 Q. And did you have the opportunity to review the data and the
11 opinions from Walmart's expert, Dr. Thompson?

12 A. Yes, I did.

13 Q. What diagnosis did Walmart's expert give Marlo?

14 A. Well, his initial thoughts were dementia.

01:53 15 Q. Okay. Well, do you agree with that diagnosis?

16 A. No.

17 Q. In your opinion were there any flaws in Dr. Thompson's
18 methodology?

19 A. Yes.

01:54 20 Q. And can you describe that, please?

21 A. Well, he's -- he was looking at a point in time. He used
22 some standard questionnaires to look for dementia. And he did
23 not -- - at least it's not recorded that he used any of the Down
24 syndrome-specific questionnaires to look at dementia.

01:54 25 But all of those groups say that if you're going to

1 use these forms, these written tests, you need to first do a
2 medical examination and rule out a medical or a psychiatric
3 cause.

4 Q. And did Dr. Thompson do any medical examination?

01:54 5 A. No, he did not.

6 Q. And did he -- so he did not rule out any medical cause;
7 correct?

8 A. Right. Those would be the things that we were talking about
9 earlier called pseudodementias. They look like it but they're
01:55 10 not.

11 Q. And in your professional opinion are there any other
12 indications in the case that rule out Dr. Thompson's dementia
13 diagnosis as the proper diagnosis for Marlo Spaeth?

14 A. The timing in terms of when her symptoms started and after
01:55 15 her being fired.

16 I put her on Citalopram which is the antidepressant.
17 And in a follow-up phone call to the family her symptoms were
18 resolved or certainly much better, and with dementia that would
19 not be the case. So it really looked more like depression and
01:56 20 anxiety.

21 She also -- people with Down syndrome who have
22 dementia, it progresses very rapidly, almost twice as fast as
23 people without Down syndrome. And so at this point she would be
24 severely demented at this point, and she's not as far as I know.

01:56 25 Q. When you say severely demented, what does that --

1 A. She would need total care. Total care --

2 Q. Bathroom care and --

3 A. Assuming she's still alive. But, yes, total care. It's
4 really heart wrenching.

01:56 5 Q. And so if we saw Marlo Spaeth walking around today, that
6 would be a sign to you that there's no way she's in advanced --

7 A. That would strongly point against it. Very strong.

8 Q. So I just wanted to make sure we caught this. Your
9 treatment recommendation after your examination was a
01:57 10 medication; correct?

11 A. Correct.

12 Q. And that was an antidepressant medication?

13 A. Yes, it was.

14 Q. Okay. And then what was your determination about the cause
01:57 15 of the depression and anxiety?

16 A. I think it was what occurred at Walmart. So the
17 disciplinary action and then being fired.

18 This was her life. She had done it for 15 years. And
19 that was taken away. And she kept talking about it. Even a few
01:58 20 years later she was still talking about it.

21 Q. In your professional experience is it common for people with
22 Down syndrome to become depressed from job loss?

23 A. Common. I don't know the percentages, but it certainly does
24 happen and we see it often enough.

01:58 25 Q. Okay.

1 MS. VANCE: I have no further questions for this
2 witness at this time.

3 THE COURT: All right, cross?

4 MR. BURNETT: Thank you, Your Honor.

01:58 5 CROSS-EXAMINATION

6 BY MR. BURNETT:

7 Q. Good afternoon, Doctor.

8 A. Hello.

9 Q. I want to go back to your visit with Marlo and her sister,
01:58 10 Amy. That occurred December 8 of 2017 according to your note?
11 That would be Exhibit 39?

12 A. Correct.

13 Q. And did I hear you correctly that in that visit the way you
14 purposely started it out was to talk to Marlo as opposed to Amy;
01:59 15 right?

16 A. Correct.

17 Q. And did I hear you correctly to say that much of this
18 history that's related in your note you obtained from Marlo?

19 A. I didn't quite say it that way. What I said was the initial
01:59 20 part of the history came from Marlo. The rest I got from Amy Jo
21 and the old records.

22 Q. The initial part of the history, does that mean the first
23 paragraph?

24 A. Well, it blends a little bit. What I got from there is
01:59 25 her -- an idea of her speech. But, more importantly, one of the

1 first things she said was about Walmart and every day is a bad
2 day. So that's what I'm seeing as her response.

3 Q. What I'm more concerned about, more interested in is who did
4 most of the talking.

02:00 5 A. Throughout the whole thing? It would be Amy Jo.

6 THE COURT: Hang on a moment. One talks at a time.

7 THE WITNESS: I'm sorry.

8 THE COURT: That's all right. You're anticipating.

9 It's a normal function of speaking with someone, but we can't do
02:00 10 it in the courtroom because he's gotta take everybody down.

11 BY MR. BURNETT:

12 Q. And I'm as bad as you are at it.

13 For example, we see Marlo Spaeth is a 51-year-old
14 woman. Would you have asked her her age?

02:00 15 A. I probably did.

16 Q. She told you?

17 A. She probably did. I didn't put quotes around it, but that
18 doesn't mean she didn't tell me.

19 Q. The only thing I see quoted in this entire visit note is
02:00 20 your comment that every day is a bad day; right?

21 A. Yes.

22 Q. So if we don't see quotes around anything else does that
23 mean --

24 A. No, I'm sorry.

02:00 25 Q. You're doing it again. Does that mean you got the

1 information from someone or somewhere besides Marlo?

2 A. No.

3 Q. So some of this information came from Marlo, are you able to
4 tell us four years later what information it was?

02:01 5 A. Four years later, probably not. I got more -- my purpose in
6 talking to her first is generally to get a feel for how she is
7 interacting with people.

8 Q. I know that was your purpose, but what I'm interested in is
9 how well Marlo was able to communicate and give you information.

02:01 10 A. Yeah.

11 Q. Okay? So if you go down to the fourth paragraph, we see the
12 series of sentences about Marlo's regular schedule. Would that
13 have been information Marlo furnished to you?

14 A. Marlo gave me the schedule information.

02:01 15 Q. And then above that in the paragraph we see something about
16 her work history first at a place called Holiday House, a
17 shelter workshop; is that something Marlo told you?

18 A. She might have. Sometimes I do get a little impatient
19 because people with Down syndrome tend to speak more slowly so I
02:02 20 probably got that from Amy Jo.

21 Q. Okay. And then she went to work for Walmart in 1999, did
22 Marlo tell you that?

23 A. I don't recall.

24 Q. And it says she had a good work record and received regular
02:02 25 raises with praise for her work. Is that something Marlo told

1 you?

2 A. No, I believe I got that from the old records.

3 Q. I didn't see anything in this note that you had any
4 difficulty that you commented on in communicating with Marlo.

02:02 5 Is that fair?

6 A. I'm sorry, say that again?

7 Q. Did you record any difficulty in communicating with Marlo in
8 this note?

9 A. Let me take a look.

02:02 10 (Witness peruses document.)

11 A. She was quiet but appropriate and cooperative. I probably
12 did not write a lot about that.

13 BY MR. BURNETT:

14 Q. Okay. Which would indicate that it didn't impress you.

02:03 15 A. In what way?

16 Q. In the sense that if you were unable to communicate with
17 Marlo, in other words, if she was -- if you asked her questions
18 that you would expect her to know the answers to and she was
19 unable to answer, we would find that information in your
02:03 20 four-page medical note. Is that a correct statement?

21 A. Yes.

22 Q. Okay. The history that came from Amy, did you rely on that?

23 A. Well, at first you learn to be suspicious. So I took it in,
24 but I also looked at other records --

02:04 25 Q. I'm not saying you didn't. But my question was really to

1 the point that, did you rely on information Amy gave you?

2 A. For the initial -- initially.

3 Q. Okay. Have you seen any records of communications between
4 Amy and the probate court about her sister's medical condition?

02:04 5 A. Say that again?

6 Q. Have you seen any records between Amy Jo Stevenson and the
7 Manitowoc County Probate Court recounting information about her
8 sister's medical condition?

9 A. Right offhand I can't think, other than having Down
02:04 10 syndrome.

11 Q. So you haven't seen any records, any reports that Amy Jo
12 Stevenson signed and furnished to the probate court Manitowoc
13 County --

14 A. There was something. I don't know -- there was something
02:05 15 she had signed. It was an official document, but I don't know
16 what it was.

17 Q. And you don't know of any annual report that she signed and
18 gave to the judge in Manitowoc County.

19 A. About how Marlo's doing?

02:05 20 Q. Yeah.

21 A. Yes, I did.

22 Q. Okay.

23 A. And there was one I think from her mother. And I think
24 that's required for guardians.

02:05 25 Q. Did you see what Amy Jo Stevenson reported about her

1 sister's medical condition in 2019?

2 A. I don't remember right offhand.

3 Q. Do you know if her sister told the Manitowoc County Court
4 her sister's medical condition in 2019 was worsening due to
02:06 5 dementia?

6 A. There was something about dementia, I remember that.

7 Q. Do you know if she told the court it was worsening due to
8 dementia?

9 A. I don't recall that.

02:06 10 Q. In 2020 do you know if Amy Jo Stevenson told the Manitowoc
11 County Probate Court that her sister's condition was the same
12 and had not improved?

13 A. The only information I can recall is when I spoke with Amy
14 Jo that her condition had improved from when --

02:06 15 Q. I'm asking you about a record --

16 A. I can't. I don't know.

17 Q. I'm asking you about a record given to the Manitowoc County
18 Probate Court, and so is a direct answer to that question you
19 haven't seen it?

02:06 20 A. I probably saw it, but I don't know. I can't tell you for
21 sure.

22 Q. No memory of what she would have told the judge.

23 A. No. I just know that there were some reports of -- they're
24 like -- I think they're a page long.

02:07 25 Q. Did you see a report to the court in the year 2021?

1 A. No. I don't think so.

2 Q. As you sit here today, can you tell the jury what Amy Jo
3 Stevenson told the probate judge in Manitowoc County her
4 sister's medical condition was?

02:07 5 MS. VANCE: Objection, relevance.

6 MR. BURNETT: Well, that record's been in, Your Honor.

7 THE COURT: Yeah, overruled.

8 BY MR. BURNETT:

9 Q. Are you able to tell us that?

02:07 10 A. No, I don't know.

11 Q. You've indicated that your diagnosis was depression, not
12 dementia; is that right?

13 A. Correct.

14 Q. Did somebody tell you when these symptoms started that you
02:07 15 saw in December of 2018?

16 A. Yes.

17 Q. And --

18 A. 2017 I saw her.

19 Q. You're right. Who told you when the symptoms started?

02:08 20 A. I believe that was -- I believe that was Amy Jo.

21 Q. Okay. And the information you got was the symptoms started
22 in early 2016; right?

23 A. Early 2016, yes.

24 Q. That was the beginning of those symptoms.

02:08 25 A. Yes. Or at least recognized symptoms.

1 Q. The first time they showed up and were recognized by the
2 people closest to her.

3 A. Yes.

4 Q. How much time elapsed between her termination at Walmart and
02:08 5 the onset of those symptoms?

6 A. It was at least a few months. Several months.

7 Q. Can you tell us what year and month she was fired at
8 Walmart?

9 A. I think it was November 2015.

02:08 10 Q. How about July, does that sound --

11 A. Was it July? Okay.

12 Q. So it was six to eight months --

13 A. Yeah.

14 Q. -- between the onset of these symptoms and her termination
02:09 15 at Walmart; right?

16 A. Correct.

17 Q. Did you consider any other explanations for this depression
18 that you identified?

19 A. Well, I usually look for losses that might have occurred
02:09 20 around the time and to see if they seem to be significant. And
21 I did not find anything. I know her mother died at some point
22 later, but --

23 Q. Mother died at some point later, meaning -- do you know when
24 her mother happened to pass?

02:09 25 A. I'd have to look it up. I don't have the exact date of

1 that.

2 Q. Was Marlo close to her mother?

3 A. I think so.

4 Q. Was her mother sick before she passed?

02:10 5 A. Yes, she was.

6 Q. Did you do anything to rule out that the onset of these
7 symptoms in early 2016 coincided with her mother's illness and
8 subsequent passing?

9 A. As best I could I tried to get some idea of that
02:10 10 relationship.

11 Q. Did Amy Jo tell you that Marlo asks even to this day about
12 her mother and stepfather frequently?

13 A. I don't recall.

14 Q. And you probably wouldn't have reason to know this, but
02:10 15 would it surprise you to hear that Marlo referred to her
16 parents' passing a couple of times in testimony today?

17 A. It could be. I would not be surprised.

18 Q. Would that indicate that that's something on her mind?

19 A. It would indicate that, yes, that that would be there.

02:11 20 Q. It might signify she's mournful and it's a loss.

21 A. Yes. There are other things that occurred that would point
22 otherwise.

23 Q. But that might be one thing that would explain the
24 depression you say you saw; true?

02:11 25 A. I did not think so.

1 Q. Okay.

2 A. I questioned that and I looked into it, but it did not seem
3 to be --

02:11 4 Q. What information did you learn that allowed you to rule it
5 out?

6 A. Well, information in terms of how she responded to the death
7 of her mother.

8 Q. And Amy Jo told you --

9 A. Yeah, I got that from her. Also in terms of Marlo, her
02:12 10 conversation focused on Walmart.

11 Q. Well, that's why you were there; right?

12 A. No, I was there to find out why she was having a problem. I
13 wasn't -- I was evaluating her as a doctor. I was trying to
14 find out why she was having trouble.

02:12 15 Q. And do you have any idea what Marlo was told about why she
16 was visiting you?

17 A. She probably thought it was --

18 Q. I don't want you to speculate. I want to know if anybody
19 told you what they informed Marlo about.

02:12 20 A. I would not have been there so I wouldn't know that.

21 Q. And nobody told you afterward what they informed Marlo
22 about.

23 A. No.

24 Q. That the very first words or close to them that you heard
02:12 25 from Marlo was "every day is a bad day;" right?

1 A. Right. And something about Walmart.

2 Q. With the every day is a bad day? So they came together?

3 A. Well, within probably -- I don't know what period of time,
4 but --

02:13 5 Q. Did that occur to you that she might have been prepared to
6 meet you?

7 A. Well, I suspect she was to some extent.

8 Q. If we go to dementia and Down syndrome, if we looked at the
9 medical literature would we see literature that reports by age
02:13 10 60, 50 percent of those having Down syndrome will suffer some
11 sort of dementia?

12 A. Yes.

13 Q. And if we looked at the medical literature would we see that
14 by age 70, 75 percent of those with Down syndrome have dementia?

02:13 15 A. There's a lot of variation in those numbers, but that would
16 be one number that would be out there.

17 Q. Okay. And in your report, although I don't think you talked
18 about it today, is it a scientific fact that those having Down
19 syndrome age faster than people who do not?

02:14 20 A. We generally assume that they are 20 to 30 years older
21 physiologically and such, yes.

22 Q. So in her early to mid 50s Marlo would be 70 to 75 --

23 A. Something like that.

24 Q. You talked a little bit about Dr. Thompson. You don't --

02:14 25 Dr. Thompson's a psychologist as opposed to a psychiatrist or

1 medical doctor; right?

2 A. Correct.

3 Q. He specializes in testing, doesn't he?

4 A. Yes.

02:14 5 Q. You don't specialize in testing, do you?

6 A. No. Well, not that kind of testing.

7 Q. When you have a patient who needs that kind of testing, you
8 send them to a specialist like Dr. Thompson, true?

9 A. After I've already ruled out all the other possibilities.

02:14 10 Q. Okay. But you don't administer those tests; right?

11 A. No, I don't.

12 Q. You don't select the tests that are to be given; true?

13 A. No, I don't.

14 Q. You don't interpret the results.

02:15 15 A. No.

16 Q. As a matter of fact, you rely on the specialist to tell you
17 what the tests mean.

18 A. Except he's not a specialist for people with Down syndrome.

19 Q. Very few are.

02:15 20 A. Very few.

21 Q. Okay. But when you send a patient to a specialist like
22 Dr. Thompson, you don't second-guess or interpret the results;
23 right? You rely on what the specialist tells you most of the
24 time?

02:15 25 A. I would not have sent them to him because he doesn't work

1 with people with Down syndrome. He doesn't know --

2 Q. I know that's your point. But when you do send people to
3 specialists like Dr. Thompson, it is their interpretation that
4 you rely on; fair?

02:15 5 A. If it makes sense, yes.

6 Q. Okay. You told us about the information that you got about
7 Marlo's current functioning. The last time you saw Marlo was
8 this December 2017 visit; is that true?

9 A. Correct.

02:16 10 Q. You told us in deposition that you assessed her at that time
11 in the high-moderate range; is that right?

12 A. Yeah.

13 Q. As of February 2019 when you had your conversation, your
14 second conversation that you alluded to with Amy and her sister,
02:16 15 you learned that Marlo had undertaken some new activities;
16 right?

17 A. Correct.

18 Q. She was going to the Wellness Center twice a week?

19 A. Correct.

02:16 20 Q. Volunteering at the church on Friday afternoons?

21 A. I think that's correct.

22 Q. She was going grocery shopping on Mondays?

23 A. I think that's correct.

24 Q. Did you know she was an avid sports fan?

02:17 25 A. I believe I did, yes. Packers.

1 Q. We heard that today. She plays bocce ball?

2 A. Yes.

3 Q. And bowls?

4 A. She learned bocce ball. She was a bowler.

02:17 5 Q. And bowling. And you probably weren't exposed to this, but
6 we learned her favorite soap operas today as well.

7 A. I can imagine.

8 Q. Your assessment was that after you prescribed the
9 antidepressant she had adjusted very well.

02:17 10 A. Yes.

11 Q. She had replaced her work at Walmart with other activities.

12 A. Correct. Can I just interject that she still -- my
13 understanding is she still talked about Walmart.

14 Q. That's what Amy Jo told you.

02:18 15 A. Well, yeah, I guess so.

16 Q. And then Amy Jo told you that she was essentially back to
17 normal; right?

18 A. Yes.

19 Q. I think you told us in deposition that you would expect it
02:18 20 to have taken about a month for Marlo to adjust to this new
21 schedule that Walmart exposed her to.

22 A. I don't think I gave a specific timeframe. But it would
23 take -- if she were to adjust, it would depend on the
24 individual.

02:18 25 Q. Is your memory vague on that?

1 A. I guess so if you're bringing out paper. Did I say a month
2 or at least a month?

3 Q. I think you said a month. But go to page 251 if you would,
4 please, Doctor.

02:19 5 Let me see if I can focus you on a specific line.

6 (Brief pause.)

7 MS. VANCE: We got the wrong transcript.

8 THE WITNESS: I have it here if you would like.

9 BY MR. BURNETT:

02:19 10 Q. Do you got it? I think I gave my copy to the judge.

11 Looking at page 251, does that refresh your
12 recollection as to whether you indicated it would take about a
13 month for Marlo --

14 A. That's not what I said in this.

02:19 15 Q. Can I --

16 A. Can I read it, what I said?

17 Q. Let me catch a copy first and then --

18 A. Okay.

19 (Brief pause.)

02:20 20 BY MR. BURNETT:

21 Q. Let's read the first two questions together on that.

22 So, Mr. Harlan asked you:

23 "So, Doctor, as you sit here today, you can't give an
24 opinion -- even after having reviewed all of Ms. Spaeth's

02:20 25 medical records, examined her in person, talked to her guardian,

1 reviewed the deposition testimony of the person who knows her
2 best, you can't give a medical opinion in terms of how long it
3 would take for Ms. Spaeth to adjust to the new schedule that she
4 was given."

02:20 5 Your answer was: "I can't give you an exact time
6 because they didn't even try.

7 "QUESTION: Can you give a rough time? How much?

8 "ANSWER: They should have been able to do it -- they
9 should be able to do it within a month, but it depends."

02:21 10 Did I read those two questions and the answers
11 accurately?

12 A. Yes. You're misinterpreting them though. As I said, it
13 depends.

14 Q. And we'll get to that.

02:21 15 A. And she might not have been able to do it at all.

16 Q. We'll get to that in a second, Doctor.

17 A. Yeah.

18 Q. One of the things that you testified to was that you
19 identify problems but you don't solve them; is that right?

02:21 20 A. Well, there are some that I don't solve them. I refer them
21 to somebody who is a specialist in a certain area.

22 Q. And you alluded to a job coach that Marlo had for a day?

23 A. Yes. Yeah.

24 Q. Can you tell us what that job coach supposedly did for her
02:22 25 to make her come to work on a regular schedule?

1 A. Well, what a job coach's job is to help that person adapt to
2 or learn a skill, and sometimes it works and sometimes it
3 doesn't.

4 Q. So it's an open question.

02:22 5 A. Right.

6 Q. Is being a job coach for this kind of a circumstance
7 something beyond your expertise?

8 A. I've never done it. I know the process, but I've not done
9 it.

02:22 10 Q. So the -- you talked about avoiding conflict. And that's a
11 feature of people -- a trait of people who have Down syndrome;
12 true?

13 A. Generally. Not always, but generally.

14 Q. Do you know whether -- Strike that.

02:23 15 Do you know whether Marlo was exposed to conflict when
16 her schedule changed with her roommate?

17 A. If there was it was minor. I think Mr. Harlan tried to
18 indicate to me earlier that it was significant, but from what I
19 understood from Barbara it was not the case.

02:23 20 Q. When you say "what I understood from Barbara," the fact is
21 you never talked to Barbara.

22 A. It was in her testimony.

23 Q. Did you ever talk to Barbara?

24 A. No.

02:23 25 Q. Did you know Barbara was Marlo's roommate?

1 A. Yes.

2 Q. Did you know that they had lived together for some 20 years?

3 A. I knew it was for a while, yes.

4 Q. Did you know that Marlo's best friend in this world is her
02:24 5 half sister Barbara?

6 A. I wouldn't be surprised.

7 Q. Okay. Did you know that Barbara was in the very next room
8 when you interviewed Marlo?

9 A. No, I did not.

02:24 10 Q. Did you know that Barbara was available by telephone should
11 you want to ask her any questions?

12 A. I did not know that, but I would assume that that would be
13 the case.

14 Q. Did you make any effort to talk to Barbara about Marlo and
02:24 15 her reaction to her work schedule?

16 A. I did not.

17 Q. You said that you read her transcript. What you read from
18 Barbara Barnes was portions of a transcript the EEOC sent to
19 you; right?

02:25 20 A. Right.

21 Q. You didn't get the whole document, true?

22 A. Correct.

23 Q. The symptoms according to your report that Amy Jo Stevenson
24 told you involved a memory loss. That's something that you
02:25 25 sometimes see with dementia; right?

1 A. Well, it's -- that's part of what dementia is, memory.

2 Q. Sure. And that her sister zoned out. That also can be
3 associated with dementia; right?

4 A. Yes.

02:25 5 Q. And that she self-talks, that's associated with Down
6 syndrome; right?

7 A. Yeah, but not -- all people do it to some extent, and -- but
8 people with Down syndrome, it's something that they're generally
9 known for.

02:25 10 Q. So it's associated with Down syndrome and with aging.

11 A. Yeah, but it's also in little kids. You'll see a kid
12 playing and they're just jabbering away.

13 Q. Associated with dementia too?

14 A. No, it's just part of developmental process.

02:26 15 Q. Irritation with others, is that something that's associated
16 with dementia?

17 A. I'm sorry?

18 Q. Irritation with others, is that something associated with
19 dementia?

02:26 20 A. That depends.

21 Q. Given those symptoms can you see why Nurse Practitioner
22 Kaminski might have thought this was dementia?

23 A. She was going on the story that everybody who was having
24 trouble would have dementia. This was a phone call.

02:26 25 Q. Given those symptoms can you see why the differential

1 diagnosis would include dementia?

2 A. Yes. I'm not blaming her, I'm just saying that she didn't
3 know. And that's part of my job is to teach people.

02:26 4 Q. Was Amy not only present on the phone call on the visit in
5 2017, but also on the phone call in 2019?

6 A. If it was 2019, yes.

7 Q. Did you tell -- Strike that.

8 In your interview with Marlo Spaeth, when you met her
9 in person, did you ask her about any prior schedule changes that
02:27 10 she had been exposed to before November of 2014?

11 A. I did not.

12 Q. You didn't know how her schedule might have varied or
13 changed.

14 A. As far from what I could gather, there was very little
02:27 15 change. From when I talked to her, it was a schedule that she
16 had had for most of those 15 years.

17 Q. Can you tell me the days of the week she usually worked?

18 A. I think she was off Thursday. She worked four days a week
19 for four hours each of those four days.

02:28 20 Q. So you were under the impression that she worked every week
21 four days a week from 12:00 to 4:00.

22 A. From 12:00 to 4:00.

23 Q. Were you under the impression that she worked four days a
24 week?

02:28 25 A. Four days a week.

1 Q. And that didn't change or vary.

2 A. It probably did a little bit.

3 Q. A little bit.

4 A. Yeah.

02:28 5 Q. You didn't know how frequently.

6 A. But I don't know. Like I said, I was told it was a fairly
7 standard schedule for her for 15 years.

8 Q. You didn't see any records, did you?

9 A. No.

02:28 10 Q. Did you ask how she adjusted to other changes in routines?

11 A. No.

12 Q. Did you ask Marlo what schedule she preferred?

13 A. No.

14 Q. Did you ask Marlo why she left early?

02:28 15 A. Why she left early?

16 Q. Yeah, why she would clock out before her shift ended?

17 A. She was following her schedule.

18 Q. Did you ask her?

19 A. Yes.

02:29 20 Q. Did you test Marlo's ability to understand?

21 A. To some extent, like I said, I talked to her and I tried to
22 get an idea of how she would respond to things.

23 Q. You mentioned that you criticized Dr. Thompson for not
24 asking questionnaires that are geared to Down syndrome patients,
02:29 25 did you administer any of those questionnaires?

1 A. No.

2 Q. Did you tell the EEOC that would be a good idea?

3 A. No, because it's not generally a good idea.

02:29 4 Q. Did you administer any objective test to measure or assess
5 what Marlo's level of understanding was?

6 A. From a written, no. I used my experience talking to her and
7 watching her.

8 Q. Did you test her ability to read and comprehend?

9 A. No.

02:30 10 Q. Does she read the newspaper?

11 A. She might.

12 Q. Do you know?

13 A. She might. I saw her working on a puzzle, so she must be
14 reading something.

02:30 15 Q. This tendency of those with Down syndrome to rely routine
16 and repetition, it's got a name in the field called the groove
17 theory; is that right?

18 A. Well, that's a term that we sometimes use, yes.

19 Q. And it means what you explained --

02:30 20 A. Routine.

21 Q. Routine. There's no real test to determine whether someone
22 has it or not; is that right?

23 A. It's -- no, in terms of a written test. It's watching what
24 they do, how they behave.

02:31 25 Q. And it's never been something that's been peer-reviewed in

1 the sense --

2 A. I don't know if it's been peer-reviewed. But I can tell you
3 that hundreds of providers of health care for people with Down
4 syndrome will either use the term or something similar to that.

02:31 5 Q. The doctors and professionals who deal with people with Down
6 syndrome know about it and are familiar with the concept of the
7 groove theory.

8 A. A lot of parents who have children with Down syndrome also
9 know that that happens.

02:31 10 Q. But it's not commonly understood, it's not well understood
11 in the medical profession, is it?

12 A. You know, there is not much taught about Down syndrome. So
13 I'm not surprised they don't really know a lot. They know about
14 the 21st chromosome. They'll know that they have congenital
02:32 15 heart disease. They might know that they have -- tend to have
16 Hirschsprung's disease and things like that. But in terms of
17 all the many medical problems that they might have and their
18 strengths and their weaknesses, most of them have no idea.

19 Q. Poorly understood in the medical profession that this groove
02:32 20 tendency group trait exists; right?

21 A. It's not discussed.

22 Q. Even among doctors.

23 A. Even among doctors.

24 Q. Is it true that some with Down syndrome possess the trait
02:32 25 and some do not?

1 A. Yes.

2 Q. And is it true that the trait can present in varying
3 degrees?

4 A. I should say I would doubt that anyone has none of it; it's
02:32 5 varying degrees is probably a better way to put it.

6 Q. Fair enough.

7 A. Like I said, they look for constancy in their life.

8 Q. It's also present in the general population to some extent,
9 isn't it?

02:33 10 A. Yes and I said that.

11 Q. I heard that. You charge for your work; correct?

12 A. Yes.

13 Q. And in this case it was \$300 an hour.

14 A. Yes.

02:33 15 Q. When I last saw your bills you had accumulated 26 hours on
16 this case and they ended in 2018. Have you charged more since
17 then?

18 A. I don't know.

19 Q. Can you tell us how much you charge for your testimony so
02:33 20 far?

21 A. I don't know.

22 Q. You're charging for being here today; right?

23 A. I will, yeah. Well, it's interesting that I was asked how
24 much I charge and somebody told me, boy, that's not very much so
02:34 25 you better charge this.

1 Q. It's probably Walmart.

2 A. Probably Walmart.

3 Q. You're currently retired; right?

4 A. Correct.

02:34 5 Q. And before you retired you saw patients in a family
6 practice; is that true?

7 A. Yes. Although the last few years of my practice it was just
8 people with Down syndrome.

9 Q. Right. And when you were in private practice in family
02:34 10 medicine, most of the people you treated and attended to didn't
11 have Down syndrome; right?

12 A. Correct.

13 Q. When you were in family practice you would spend I think one
14 day a month at the Down syndrome clinic that you founded?

02:34 15 A. That was in the beginning, yes.

16 Q. And after you closed your family practice you spent two days
17 a month at the Down syndrome clinic; is that right?

18 A. I think it was a little bit more than that at first and then
19 it cut back. I have some health problems and so I found that I
02:35 20 could not reliably get to the clinic. And people would, you
21 know, spend a day trying to get to the clinic and then I
22 wouldn't be there, that just wasn't fair.

23 Q. Sure. You don't consider yourself Marlo Spaeth's treating
24 physician, do you?

02:35 25 A. No.

1 Q. I think you -- is it fair to say you saw her for purposes of
2 legal consultation?

3 A. Kind of. It was a consultation. If it was just legal I
4 would not have treated her, I think. But I saw her and charged
02:35 5 her as if it was a medical consultation.

6 Q. Didn't the EEOC pay your bill for seeing her?

7 A. No.

8 Q. Sure?

9 A. I don't think so.

02:36 10 Q. I'm going to show you the --

11 A. Maybe they did. I don't know.

12 Q. I'm going to show you the bills to help you remember.

13 MR. BURNETT: Your Honor, I don't see a need to mark
14 these unless the Court wants that done if I'm just going to
02:36 15 refresh recollection.

16 THE COURT: If all you're going to do is refresh the
17 recollection, that's fine.

18 BY MR. BURNETT:

19 Q. Doctor, I'm going to show you a document that I'll just ask
02:36 20 you to read to yourself and tell us whether or not that helps
21 you remember.

22 A. It does say that I did charge for that.

23 Q. To the EEOC?

24 A. Yeah.

02:36 25 Q. Okay. Thank you. I think you told us already, but you

1 volunteered for this litigation, true?

2 A. Correct.

3 Q. You said, I think to use your words, that you got fired up;
4 right?

02:37 5 A. Yeah.

6 Q. After reading a newspaper article?

7 A. Well, somebody reported it to me or I read it, one or the
8 other.

9 Q. And then you called the EEOC and suggested you might get
02:37 10 involved and work for them.

11 A. I asked them if they could use my help.

12 Q. And they said yes?

13 A. Yeah. Yes.

14 Q. Your son has Down syndrome?

02:37 15 A. Yes, he does.

16 Q. Is it true that what you brought to this case, that you
17 undertook the case to review it, prepare a report, reach
18 conclusions all after a career of advocating for people with
19 Down syndrome?

02:37 20 A. It was after that, yes.

21 Q. And when we look on your curriculum vitae on page 11, did
22 you give a presentation --

23 That would be Exhibit 38 for your reference. Page 11.

24 Are you there, Doctor?

02:38 25 A. What page?

1 Q. Page 11. So it would be the last page.

2 A. Okay.

3 Q. Did you give a publication called "The Family Practitioner
4 as Advocate and Advocate Stimulator"?

02:38 5 A. Correct.

6 Q. And that was given at the Ross Roundtable on Health Care for
7 Individuals with Down Syndrome in Washington, D.C.?

8 A. Correct.

9 MR. BURNETT: Okay. Thank you, Doctor, that's all
02:38 10 I've got.

11 THE COURT: Any redirect?

12 MS. VANCE: Thank you.

13 THE WITNESS: Do you want to know what that's all
14 about?

02:39 15 REDIRECT EXAMINATION

16 BY MS. VANCE:

17 Q. Dr. Smith, you mentioned that -- I heard you mention that
18 it's common for parents of children with Down syndrome to know
19 the importance of routine.

02:39 20 A. Correct.

21 Q. Now, is that tendency, that need for routine something you
22 would notice about a person with Down syndrome if you were their
23 work colleague for 15 years?

24 MR. BURNETT: Your Honor, I think we don't have any
02:39 25 foundation for this.

1 THE COURT: Sustained.

2 BY MS. VANCE:

3 Q. Is the desire for routine in Down syndrome something a
4 person could notice by spending a lot of time with somebody who
02:40 5 has Down syndrome?

6 A. Yes.

7 Q. And on the issue of a routine including days of the week and
8 hours, if a person's hours of work are the same every time they
9 go to work, is that still a routine even if the days of the week
02:40 10 may differ from week to week?

11 A. Yes. Very much so.

12 Q. Can you explain why?

13 A. Well, it's -- once you're there -- I mean, it's like when
14 one of us goes on vacation, we come back to work. We haven't
02:41 15 forgotten how to do it just because we weren't there for one or
16 two weeks or whatever.

17 So they still have the routine that when they are in
18 that setting -- who knows what stimulates that. The sights, the
19 smells, the sounds, all those things have an impact on them, and
02:41 20 then here I am, these are the hours that I work when I'm here.

21 Q. These are the hours that I work when I'm here?

22 A. They probably don't think of it that way, but they know what
23 their schedule is.

24 MS. VANCE: Thank you. I have no further questions
02:41 25 for the witness.

1 THE COURT: Okay. Thank you, Dr. Smith, you can step
2 down.

3 (Witness excused at 2:41 p.m.)

4 THE COURT: Okay. We'll take a recess at this point.

02:41 5 MS. VANCE: Sure.

6 THE COURT: Okay. We'll take our afternoon recess.

7 (Jury out at 2:42 p.m.)

8 (Discussion off the record.)

9 MR. HARLAN: Can we wait until they close their case?

02:44 10 THE COURT: Sure.

11 MR. HARLAN: Thank you, Your Honor.

12 THE COURT: We may have you proceed with your case and
13 then reserve your right to make your motion till the end of the
14 day so we don't move back and forth with the jury.

15 MR. HARLAN: Absolutely. Not a problem.

16 THE COURT: But you can formulate it in-between then.

17 Okay, we're in recess then until about five to maybe,
18 3:00, in that area.

19 (Recess taken at 2:45 p.m., until 3:01 p.m.)

03:02 20 (Jury in at 3:02 p.m.)

21 THE COURT: Okay, please be seated. And you may
22 proceed.

23 MS. VANCE: Thank you, Your Honor.

24 The plaintiff now will read from excerpts from the
03:02 25 deposition of Walmart's corporate deponent.

1 THE COURT: Okay.

2 LEE SPUDE, PLAINTIFF WITNESS, VIA DEPOSITION

3 DESIGNATIONS READ AS FOLLOWS:

4 Q. Good morning, Mr. Spude.

03:03 5 A. Good morning.

6 Q. Mr. Spude, you're the market human resources manager for the
7 Wisconsin region; is that correct?

8 A. For a portion of the Wisconsin region, yes. I oversee two
9 of the seven territories now. It's either seven or eight. So I
03:03 10 oversee 23 stores in what we currently call Market 440 and
11 Market 436.

12 Q. And do you understand that you've been designated as
13 Walmart's corporate witness?

14 A. I do. I understand.

03:03 15 Q. Okay. And so this means you're required to testify about
16 all the information which is known or reasonably available to
17 Walmart regarding the subjects and documents identified in
18 EEOC's Rule 30(b)(6) corporate deposition notice.

19 A. I understand.

03:04 20 Q. I'd like to have Exhibit 1061, which is admitted into
21 evidence.

22 (Exhibit 1061, Accommodation in Employment -
23 (Medical-Related) Policy - Wisconsin - March 5, 2014 [D001004 -
24 D001008], admitted previously by stipulation.)

03:04 25 Q. And can you take your time and review that.

1 A. Okay. I've reviewed document 1061. I haven't read it word
2 for word in its entirety, but it looks accurate to the documents
3 that I have reviewed to prepare for the testimony.

4 Q. Okay. And this policy applies to all associates who work
03:04 5 for Wal-Mart Stores, Inc. or one of its subsidiary companies in
6 Wisconsin; is that correct?

7 A. That's correct.

8 Q. So the policy indicates on page 2, let's look at that, that
9 reasonable accommodations can include providing part-time or
03:05 10 modified work schedules; is that correct, if you look at the
11 center of the page?

12 A. Yes. On bullet point 4, under "reasonable accommodations
13 can include," it states "providing part-time or modified work
14 schedules."

03:05 15 Q. Yes. And the policy provides that "an associate can request
16 a reasonable accommodation at any time by telling a salaried
17 member of management that they need help to do their job because
18 of their condition;" correct?

19 A. If you can, clarify where you are referring to specifically.

03:05 20 Q. Sure. If you look at the bottom of page 2, the last line.
21 "You may request a job adjustment or reasonable accommodation at
22 any time by telling any salaried member of management in your
23 facility, or an HR representative, that because of your
24 condition you need help to do your job or gain access to your
03:06 25 workplace."

1 A. That is correctly read, yes.

2 Q. And the policy also specifically states that "a family
3 member, friend, job coach or health care professional may also
4 request such assistance on the associate's behalf;" correct?

03:06 5 A. Correct.

6 Q. Okay. And the policy also provides that "as soon as you
7 request an accommodation based on a medical condition, we will
8 begin working with you to determine whether or not you're
9 eligible for a job adjustment due to your medical condition."

03:06 10 Is that accurate?

11 A. That's accurate, yes.

12 Q. "And if a job adjustment's not granted, we will continue to
13 work with you to determine whether you are eligible for a
14 reasonable accommodation due to a disability." Is that correct?

03:06 15 A. That is accurate.

16 Q. Is that accurate?

17 A. That is accurate, correct.

18 Q. Did Walmart consider returning Marlo Spaeth to her noon to
19 4:00 schedule as a reasonable accommodation in 2014?

03:06 20 A. Prior to Marlo's termination -- I think that can help
21 quantify the time concern -- prior to Marlo's termination there
22 was no consideration to adjust her schedule to a noon to 4:00
23 schedule. The reason that there was no -- no consideration for
24 that, is there was never an accommodation request; nor did the
03:07 25 company see any reason nor any suggestion that Marlo would need

1 an accommodation to adjust her schedule to the noon to 4:00
2 shift.

3 Q. But the policy says you may request a reasonable
4 accommodation at any time by telling any salaried member of
03:07 5 management in your facility that because of your condition you
6 need help to do your job; is that correct?

7 A. Yes, it specifically states that you may request an
8 accommodation. Yes, you are correct in saying that.

9 Q. By telling a salaried member of management that you need
03:07 10 help.

11 A. Yes. You are accurately reading this, yes.

12 Q. And you testified that Walmart did not consider returning
13 Marlo Spaeth to her noon to 4:00 schedule as an accommodation
14 prior to her termination; is that correct?

03:08 15 A. That is correct, yeah.

16 Q. Did Walmart consider returning Marlo Spaeth to her noon to
17 4:00 schedule as an accommodation after her termination?

18 A. After her termination there was an investigation into
19 multiple aspects of the case that you are referring to and, as
03:08 20 part of that thought process, yes, that was considered regarding
21 to whether or not a modified schedule is an option of any kind.
22 So the answer to your question is specifically, yes, that was
23 considered at that time.

24 Q. What was the determination of that consideration?

03:08 25 A. The ultimate determination was that she should not be

1 reinstated. And so the conversation specifically of what her
2 schedule would or wouldn't be never came to fruition because it
3 was decided that she would not be reinstated.

4 So an associate who is not reinstated has no need for
03:08 5 a schedule of any kind. So the final determination of what her
6 schedule should be was never -- a final decision never came to
7 fruition.

8 Q. Okay. So let's look at what is admitted as Exhibit 30.
9 Take time to review that.

03:09 10 A. Okay. And, again, I haven't read it in its entirety word
11 for word, but it looks accurate to my knowledge.

12 Q. Okay. So these are the Accommodation in Employment,
13 Medical-Related Management Guidelines of Walmart that were in
14 effect between June 2013 and August 2015; is that correct?

03:09 15 A. That's correct.

16 Q. And these guidelines applied to all supervisors and managers
17 who worked for Walmart nationwide from June 2013 to August 2015;
18 is that correct?

19 A. That's correct.

03:09 20 Q. And these national Walmart guidelines also indicate that
21 family members of an associate can request an accommodation on
22 their behalf; correct?

23 A. I can confirm that under the heading "Identifying a Request
24 For Job Assistance," the first section starts to read: "An
03:10 25 associate may request job assistance in a variety of ways."

1 Q. Yes.

2 A. "She or he may make the request directly, or a family
3 member, job coach" or, excuse me, "friend, job coach, health
4 professional or other person may make the request on the
03:10 5 associates's behalf." Is that what you're referring to?

6 Q. Yes. So the national management guidelines also indicate
7 that family members of an associate can request an accommodation
8 on their behalf; right?

9 A. Yes.

03:10 10 Q. Okay. And the guidelines also describe something called
11 "request for job assistance;" is that correct?

12 A. That's correct.

13 Q. And they're also referring to JAs; right?

14 A. Yes, JAs, correct.

03:10 15 Q. And these guidelines state that "job assistant requests can
16 be approved at the store level;" correct?

17 A. Correct.

18 Q. And the policy states: "Medical information is not
19 necessary if the associate has a known or easily observable
03:11 20 disability;" correct?

21 A. Correct.

22 Q. And the guideline states, if you go to the next page, under
23 the heading "Scheduling," that "minor changes to availability
24 and scheduling preferences are a category of job assistance that
03:11 25 can be approved in the store by a facility manager;" right?

1 A. Yes. Under the heading "Requests That Can Be Approved as
2 JAs" it does specify that scheduling is an option.

3 Q. Okay. And the guidelines also state that "if an associate
4 makes a request that does not qualify as a request for a job
03:11 5 assistance that can be approved in the store facility manager,
6 the request must be immediately forwarded to the Accommodation
7 Service Center;" correct?

8 A. That is correct.

9 (Deposition read-in concluded at 3:12 p.m.)

03:12 10 * * *

11 MS. VANCE: That ends the reading from the corporate
12 deposition of Walmart taken April 5th, 2019.

13 THE COURT: Okay. Any further evidence then from the
14 plaintiff?

03:12 15 MS. VANCE: The EEOC rests, Your Honor.

16 THE COURT: Okay. The EEOC has rested.
17 Defendant Walmart?

18 MR. HARLAN: We are calling Barbara Barnes as our
19 first witness, adversely.

03:14 20 THE COURT: All right.

21 THE CLERK: If the witness would please raise your
22 right hand.

23 BARBARA BARNES, DEFENSE WITNESS, DULY SWORN

24 THE CLERK: Please state your name.

03:14 25 THE WITNESS: Barbara Barnes.

DIRECT EXAMINATION

BY MR. HARLAN:

Q. Good afternoon, Ms. Barnes. I'm going to be asking you questions. Let me ask you, do you have a preference in terms of where you would like me to be when I'm talking to you? Do you want me to sit down? Do you have any preference of whether I stand up, come over by you? I'll let you run the show.

A. Doesn't matter.

Q. Okay. So do you recall meeting with me at your deposition in this case; correct?

A. Yes.

Q. And we had a discussion about a number of facts relating to Marlo Spaeth who is your roommate; correct?

A. Yeah.

Q. And she is somebody that you share an apartment with; correct?

A. Yes.

Q. And you shared an apartment with her for more than 10 years; correct?

A. Yes.

Q. And in that apartment it's just been you and her there; correct?

A. Yeah.

Q. Living on your own.

A. Yeah.

1 Q. And I think at the deposition one of the things that we
2 established early on was in terms of the person who you are the
3 closest to in the whole world is Marlo Spaeth.

4 A. Yes.

03:15 5 Q. And that continues to be the case; correct?

6 A. Yes.

7 Q. In short, she's your best friend.

8 A. Yes, she is.

9 Q. So if somebody wanted to know something about Marlo Spaeth
03:16 10 in terms of her habits, routines, likes, dislikes, is there
11 anybody in the world who would have a better handle on that than
12 you?

13 A. Uh-uh.

14 Q. You're the best person in the world to know what Marlo is
03:16 15 about; correct?

16 A. Yes.

17 Q. And you certainly wouldn't want to see anything bad happen
18 to Marlo, would you?

19 A. No, I wouldn't.

03:16 20 Q. And you would do everything you could to protect her.

21 A. Yes.

22 Q. You love her. She's your best friend; correct?

23 A. Yes.

24 Q. Now, your families have been close; right? My understanding
03:17 25 is Ms. Spaeth's mother married your dad; correct?

1 A. Yes.

2 Q. And your families have always been pretty close; correct?

3 A. Yes.

4 Q. Do you know that Amy Jo Stevenson testified in this case?

03:17 5 A. Yes.

6 Q. Did she talk to you about her testimony that she gave in
7 this case?

8 MS. CARTER: Objection, foundation.

9 BY MR. HARLAN:

03:17 10 Q. Did you speak to Amy Joe Stevenson about the fact that she
11 testified in this trial?

12 MS. CARTER: Objection, confusing.

13 THE COURT: Overruled. Can you answer that question,
14 Ms. Barnes? Do you want to read it back

03:17 15 MR. HARLAN: I'll try to break it down.

16 BY MR. HARLAN:

17 Q. Did you talk to Amy Jo yesterday?

18 A. Yeah, I talked to her yesterday.

19 Q. And what did you talk to her about?

03:18 20 A. She talked about that she testified here yesterday.

21 Q. And so when Ms. Stevenson testified we didn't really get a
22 lot about her background in her testimony. So you know
23 Ms. Stevenson pretty well; correct?

24 A. Yes.

03:18 25 Q. And did she go to college?

1 A. Yes, she did.

2 Q. And she got a college degree, didn't she?

3 A. Yes.

4 Q. In fact, isn't she a CPA, an accountant? If you know.

03:18 5 A. No, I don't know.

6 Q. Does she run her own business?

7 A. Yes, she does.

8 Q. And what kind of business does she run?

9 A. She does screen printing with T-shirts and sweatshirts and
03:18 10 stuff.

11 Q. Okay. So she's a business woman.

12 A. Yes.

13 Q. Okay. A pretty astute sophisticated individual.

14 A. Yes.

03:19 15 Q. There's also been some testimony in this case about
16 Ms. Spaeth and her reading. And I think we covered that at your
17 deposition. We talked about Marlo and her ability to read. So
18 one thing we can establish is that Marlo does have the ability
19 to read; correct?

03:19 20 A. Yes.

21 Q. And she also has the ability to understand things; correct?

22 A. Yes.

23 Q. And when you ask her questions at home she can answer those
24 questions.

03:19 25 A. Yes.

1 Q. And she reads the newspaper; correct?

2 A. Yes.

3 Q. And she reads it every day, at least at the time of the
4 deposition; right?

03:19 5 A. Yeah.

6 Q. After she reads the paper and you read the paper, you all
7 discuss what you read; correct?

8 A. Yeah.

9 Q. And so based on your discussions with Ms. Spaeth after
03:20 10 reading the paper, you have developed a understanding and belief
11 that she understands the things that she's read in the
12 newspaper; correct?

13 A. Yes.

14 Q. And that was the case when she was working at Walmart;
03:20 15 correct?

16 A. Yeah, she could read.

17 Q. Thank you. And including during the period of time when she
18 worked at Walmart; correct?

19 A. Yeah.

03:20 20 Q. So when we met in Manitowoc for your deposition in this
21 case, it was during football season; correct?

22 A. Yes.

23 Q. And I think we had a lot of discussions about you and
24 Ms. Spaeth's favorite football team; right?

03:21 25 A. Yeah.

1 Q. That wouldn't be the Chicago Bears, would it?

2 A. No.

3 Q. And prior to that deposition you spent some time with the
4 fine lawyers from the EEOC, didn't you?

03:21 5 A. (No response.)

6 Q. Before you had your deposition did you meet with lawyers
7 from the EEOC?

8 A. Yes.

9 Q. Okay. What did you all discuss at that meeting? Were they
03:21 10 helping you to prepare for your deposition?

11 A. Yes. Yeah.

12 Q. Let me know if I'm speaking too fast. I tend to be
13 rapid-fire so I apologize if that's the case. So when you met
14 with them they were giving you some idea of what was going to be
03:21 15 discussed at the deposition; correct?

16 A. Yeah.

17 Q. Did they repeat the same thing for this case? Did they meet
18 with you and talk to you about the testimony that you were going
19 to give at this trial?

03:22 20 A. (No response.)

21 Q. Do you recall that, ma'am?

22 A. No.

23 Q. Have you spoken with the lawyers from the EEOC in the last
24 week?

03:22 25 A. Yeah.

1 Q. Okay. And would you tell us what you discussed with the
2 lawyers from the EEOC.

3 A. They just went over the stuff about what they're going to be
4 talking about.

03:22 5 Q. Okay. Did they explain to you why you, as a person who was
6 the closest person to Marlo Spaeth in the world, would not be
7 called by them in this case?

8 A. (No response.)

9 Q. Let me try to repeat the question. Did they tell you or
03:23 10 explain to you why, since they are bringing a case on behalf of
11 Marlo Spaeth, they would not put you up as a witness in this
12 case?

13 A. (No response.)

14 Q. Did you have any discussion along those lines?

03:23 15 A. (Nods.)

16 Q. So you're here today because Walmart issued a subpoena
17 asking you to come and testify today; correct?

18 A. (Nods.)

19 Q. Did you receive a piece of paper from somebody who knocked
03:24 20 on your apartment door?

21 A. Yes.

22 Q. And said that you should come and testify in this case;
23 correct?

24 A. Yes.

03:24 25 Q. All right. And when you got that piece of paper did you

1 call anybody to let them know that you received the piece of
2 paper asking you to come testify?

3 A. Yeah, I talked to Marlo's sister, Amy Jo.

03:24 4 Q. Okay. And then did you talk to any of the folks from the
5 EEOC?

6 A. Amy called them up.

7 Q. Okay. And what can you tell us about that conversation?

8 A. I don't know.

9 MS. CARTER: Objection. Foundation.

03:24 10 THE COURT: Sustained.

11 BY MR. HARLAN:

12 Q. So for your -- and it's perfectly fine that you would have
13 met and talked with the lawyers. The judge is going to give an
14 instruction to the jury perhaps that that's certainly
03:25 15 permissible, but I think it's just important to understand the
16 relationship.

17 So did you meet with the lawyers from the EEOC or have
18 a phone call with them to prepare for your testimony today?

19 A. Yes.

03:25 20 Q. Okay. When did you first have a phone call to prepare for
21 what's happening today?

22 A. I don't remember what day that was on.

23 Q. Was it this week?

24 A. It was a few weeks ago.

03:26 25 Q. Okay. And so you haven't spoken with the lawyers from the

1 EEOC about anything for two weeks.

2 A. Yeah.

3 Q. Okay. And when you had that conversation two weeks ago, did
4 they talk about the things that would likely come up today?

03:26 5 A. They talked to us on the phone about it.

6 Q. When you say "they talked with us," was --

7 A. They talked to Marlo and talked to me about it.

8 Q. Okay, thank you. So just a little bit with your educational
9 background. My understanding is you went to Lincoln High School

03:26 10 in Manitowoc?

11 A. Yes.

12 Q. And you graduated.

13 A. Yes.

14 Q. What's the mascot for your old high school? Do you
03:26 15 remember?

16 A. I don't remember.

17 Q. Okay. And at your deposition one of the things that I think
18 you told me, and I think you were proud of, is that you have a
19 pretty good memory; correct?

03:27 20 A. Yes.

21 Q. And as you are here today, you still have a pretty good
22 memory; correct?

23 A. Yes.

24 Q. And obviously I think at our deposition I didn't see you
03:27 25 with a walker, so I assume you've had some health issues since

1 the last time we met at your deposition; correct?

2 A. Yes.

3 Q. I don't want to get into the specifics, but it doesn't have
4 anything to do with your memory; correct?

03:27 5 A. No.

6 Q. So your memory is not affected by whatever condition you
7 have, to your knowledge; correct?

8 A. Correct.

9 Q. So I don't want to create any conflict with your roommate,
03:27 10 but one of the things we discussed today was bowling and I asked
11 your roommate who the better bowler was, and who do you think
12 she said was a better bowler?

13 A. I was.

14 (General laughter.)

03:28 15 BY MR. HARLAN:

16 Q. Like I said, I won't go there. So I think when we spoke at
17 your deposition, you know, you talked about some of the
18 activities that you and Ms. Spaeth enjoyed; correct?

19 A. Yes.

03:28 20 Q. And I think one of the things that you told me that you and
21 Marlo like to do is to go to Brewers games.

22 A. Yeah.

23 Q. Have you continued to go to Brewers games with Marlo?

24 A. We haven't been to a game yet.

03:28 25 Q. Do you all watch Brewers baseball on TV?

1 A. Yes, we do.

2 Q. Do you call yourselves loyal dedicated fans?

3 A. Yes.

4 Q. Did they play last night?

03:28 5 A. No.

6 Q. They play tonight?

7 A. (Nods.)

8 Q. And then you also, in addition to bowling, and I'll probably
9 butcher the name, is it bocce ball?

03:29 10 A. Bocce ball, yeah.

11 Q. That's another thing that you and Ms. Spaeth like to do;
12 right?

13 A. Yes.

14 Q. And it's something that you were doing when Ms. Spaeth was
03:29 15 at Walmart; correct?

16 A. Yes.

17 Q. And it's something that you're doing up until this day;
18 correct?

19 A. Yeah.

03:29 20 Q. And you also go to church on a regular basis.

21 A. Yes.

22 Q. With Ms. Spaeth; correct?

23 A. Yes.

24 Q. And you and Ms. Spaeth also shop at Walmart.

03:29 25 A. No, well, grocery shopping we go to the Festival Food.

1 Q. Did you used to shop at Walmart?

2 A. We used to go, yeah.

3 Q. And that was a favorite activity when Ms. Spaeth was working
4 at Walmart; correct?

03:29 5 A. Yes.

6 Q. And shopping, bocce ball, bowling, shopping at Festival
7 Foods, those are things that you and Ms. Spaeth did prior to her
8 leaving Walmart and afterwards; correct?

9 A. Yes.

03:30 10 Q. And we heard some testimony about the Wellness Center, so
11 that's another activity that you and Ms. Spaeth engage in;
12 correct?

13 A. Yes.

14 Q. And when she was at Walmart she would go with you from time
03:30 15 to time?

16 A. Yes.

17 Q. And now that she's no longer at Walmart she goes with you a
18 couple of times a week to exercise; correct?

19 A. Yeah, we used to do that. We don't anymore.

03:30 20 Q. And when did you stop going a couple times a week?

21 A. We stopped going when they had that -- when the virus
22 started last year.

23 Q. And so you haven't done that for a while.

24 A. No.

03:31 25 Q. But you were doing it prior to the virus after Ms. Spaeth

1 left Walmart.

2 A. Yes.

3 Q. And is that something that she seemed to enjoy?

4 A. Yes.

03:31 5 Q. We also discussed cooking and who has the cooking duties in
6 the household; right?

7 A. Yeah.

8 Q. And I think you told me that you cook?

9 A. Yeah.

03:31 10 Q. And Ms. Spaeth cooks.

11 A. Yes.

12 Q. So she has the ability to prepare meals just like you do;
13 correct?

14 A. Correct.

03:31 15 Q. And she still does that; correct?

16 A. Yes.

17 Q. And so do you.

18 A. Yeah.

19 Q. Now, we talked with Ms. Spaeth briefly about Special
03:31 20 Olympics, that she is going to participate -- participant in
21 Special Olympics for a number of years and I take it so have
22 you.

23 A. Yeah.

24 Q. And that goes back to prior to 2014; correct?

03:31 25 A. Yeah.

1 Q. And from that point to the present you all have been active
2 in Special Olympics; correct?

3 A. Yeah.

4 Q. We also talked about somewhat of a sensitive issue at your
03:32 5 deposition and I'm only going to briefly touch on it because it
6 has something to do with the case. We talked about Marlo's
7 mother passing. Do you remember that?

8 A. Yeah.

9 Q. And if I'm correct, Ms. Spaeth's mother died after she left
03:32 10 Walmart, some point after that; correct, around 2016?

11 A. Yeah.

12 Q. And when that event happened Ms. Spaeth was sad; correct?

13 A. Yeah.

14 Q. And you saw her cry on that occasion.

03:33 15 A. Yes.

16 Q. And even to this day you hear Ms. Spaeth talk about how she
17 misses her mother; correct?

18 A. Yes.

19 Q. Now I want to talk about another issue that we've heard a
03:33 20 lot about in this case and that's the bus. So the bus is the
21 primary mode of transportation for you and Ms. Spaeth; correct?

22 A. Yes.

23 Q. Neither one of you drive.

24 A. No.

03:33 25 Q. And so you're pretty good at being able to get where you

1 need to go on the bus; correct?

2 A. Yes.

3 Q. And that means that I assume that you, for instance, know
4 the bus routes and schedules and what time they come.

03:33 5 A. Yeah.

6 Q. And so does Ms. Spaeth, from your understanding.

7 A. Yeah.

8 Q. Okay. And the bus stop is really right across the street
9 from your apartment; correct?

03:34 10 A. Yes.

11 Q. And my understanding is for the entirety of Ms. Spaeth's
12 employment she never expressed any concern about taking the bus;
13 correct?

14 A. No.

03:34 15 Q. Does she have any concern about taking a bus?

16 A. No.

17 Q. And from your experience as someone who uses the bus system
18 in Manitowoc, would you agree with me that it's a pretty
19 reliable system?

03:34 20 A. Yes.

21 Q. And would you also agree that the buses run with some
22 frequency?

23 MS. CARTER: Objection, foundation.

24 BY MR. HARLAN:

03:34 25 Q. Do you know if the buses run with some regularity based on

1 your experience?

2 A. Yeah.

3 Q. Thank you. And based on what you observed with Ms. Spaeth,
4 you've seen her take a variety of different buses within the
03:35 5 Manitowoc bus system; correct?

6 A. Yeah.

7 Q. She's not wedded to one particular bus; am I correct?

8 A. No.

9 Q. Am I correct that she takes a variety of different buses and
03:35 10 doesn't rely on any one particular bus?

11 MS. CARTER: Objection, foundation and compound.

12 THE COURT: Can you rephrase?

13 BY MR. HARLAN:

14 Q. Okay. So you're familiar with Ms. Spaeth in terms of her
03:35 15 utilization of the bus system; correct?

16 A. Yes.

17 Q. And based on your knowledge from observing her take
18 different buses, does she rely on a particular bus to get around
19 or does she take buses at different times and different parts of
03:35 20 the day?

21 MS. CARTER: Objection, compound.

22 THE COURT: Overruled.

23 THE WITNESS: She would take Route 3 to get over to
24 Walmart when she was working there. And then otherwise if she
03:36 25 was just going shopping or out to eat, then she would just stay

1 on the 1 bus.

2 BY MR. HARLAN:

3 Q. And the Route 3 bus that you mentioned runs at different
4 times; correct?

03:36 5 A. Yeah.

6 Q. So besides taking the bus to work, taking it to the Wellness
7 Center, are there some other places that you and Ms. Spaeth
8 would take the bus?

9 A. Yeah, we take it to go out to eat sometimes on Saturdays.
03:36 10 We take the bus to go out to McDonald's or Culver's.

11 Q. And with the particular bus that you would catch, would it
12 always be the same bus at the same time or it just depend at the
13 time of the day that you wanted to go?

14 A. It's the same bus.

03:37 15 Q. And it was always at the same time?

16 A. Yes.

17 Q. And what time was that?

18 A. We'd always take the bus at 11:15 on Saturday and catch the
19 bus there and then go to get dropped off to where we were going
03:37 20 to go out to eat that day.

21 Q. Okay. Now, you also mentioned to me that while Ms. Spaeth
22 was at Walmart working, you would from time to time go and see
23 her while she was working; correct?

24 A. Yes.

03:37 25 Q. And I think you told me that on some of the occasions when

1 you would go see her working at Walmart, she would be helping
2 customers.

3 A. Yes.

03:37 4 Q. And in terms of directing them to where they could go find
5 things that they were looking for; correct?

6 A. Yes.

7 Q. And she didn't have any -- you didn't notice her having any
8 difficulties in that activity; correct?

9 A. No.

03:38 10 Q. Now, at some point you're aware that Ms. Spaeth, her work
11 hours changed from the hours that she used to work; correct?

12 A. Yes.

13 Q. And one of the things that happened as a result of her hours
14 changing is that you weren't happy about it; correct?

03:38 15 A. No.

16 Q. So, I mean, you were not pleased when she got different
17 hours; correct?

18 A. Yeah, because she wouldn't get home until later.

03:38 19 Q. And as a result of her having to come home later because the
20 new work schedule that she had, the impact on you was that
21 supper would be later than it would typically have been;
22 correct?

23 A. Yes.

24 Q. And you talked to Ms. Spaeth about that; correct?

03:39 25 A. She told me she didn't like her hours being changed. When

1 she first was -- when she worked with Brett -- Brett was the
2 manager at Walmart, he had her work from noon to 4:00 and she
3 said -- she'd get home at 5:00 for supper then. When they
4 switched her hours she didn't get home until later at night.

03:39 5 Q. Right.

6 A. She complained to her -- she talked to her mom and her
7 sister about it.

8 Q. And that was -- when she talked to her mom and sister about
9 it, that was pretty soon after she got those new hours; correct?

03:39 10 A. Yeah.

11 MS. CARTER: Objection, vague.

12 THE COURT: Just a minute, "pretty soon." Is that too
13 vague? Okay, sustained.

14 BY MR. HARLAN:

03:40 15 Q. So when you testified that Ms. Spaeth spoke with her mother
16 and sister about the hour change, how soon was it after the hour
17 change that you recall her talking to her mother and her sister
18 about that?

19 A. Right after her hours got changed she talked to them.

03:40 20 Q. Thank you. And you also talked to Ms. Spaeth about the fact
21 that you weren't pleased that you were having to have supper
22 later because her hours had changed; correct?

23 A. Yeah.

24 Q. Now, you mentioned that her hours changed, but there was a
03:40 25 point in time when she worked from noon to 4:00 that she would

1 come home earlier than 4:00; correct?

2 A. When she worked from noon to 4:00 she'd get home about a
3 little after 5:00.

03:41

4 Q. Do you recall any occasions when she came home earlier than
5 that?

6 A. No, I don't.

7 Q. One of the things that you told me in the deposition was
8 Marlo's feeling about her supervisor, Julia; correct?

9 A. (No response.)

03:41

10 Q. Let me back up. Do you recall that one of the folks who
11 supervised Ms. Spaeth was named Julia?

12 A. Julie.

13 Q. Julie. And is her last name Stern?

14 A. I don't know what her last name is.

03:41

15 Q. Okay. And Ms. Spaeth told you that she didn't like Julie;
16 correct?

17 A. Yes.

18 Q. And she said that Julie was always trying to tell her what
19 to do on the job; right?

03:42

20 A. Yeah.

21 Q. But Marlo never said Julie was mean or nasty or used bad
22 language, did she?

23 MS. CARTER: Objection, compound.

24 MR. HARLAN: I'll withdraw.

03:42

25 BY MR. HARLAN:

1 Q. Did Ms. Spaeth ever tell you that Julie was mean to her?

2 A. She'd always tell me that she never liked her.

3 Q. Did she ever tell you that Julie was nasty to her?

4 A. No.

03:42 5 Q. Okay. Or that she had used bad language with her?

6 A. No.

7 Q. And you saw this person named Julie on occasion when you
8 would visit the Manitowoc store; correct? The Manitowoc
9 Walmart.

03:43 10 A. Yeah.

11 Q. And she was never mean to you, was she?

12 A. I didn't know her so I wouldn't --

13 Q. She never did anything bad to you when you would visit
14 there, did she?

03:43 15 A. No.

16 Q. So you -- I think you testified that you have a pretty good
17 recollection of when Ms. Spaeth's hours changed from 12 to 4:00
18 and she was working later; correct?

19 A. Yeah.

03:43 20 Q. And when that happened she still got up around the same
21 time?

22 A. Yeah.

23 Q. Went to bed about the same time?

24 A. Yeah.

03:43 25 Q. Seemed to be a happy person; correct?

1 A. Yeah.

2 Q. And her health appeared to be the same; correct?

3 A. Yeah.

4 Q. And one of the things you noticed after her hours changed
03:44 5 was that she was coming home like she was working her previous
6 schedule; correct? Early.

7 A. (No response.)

8 Q. I'll withdraw. After Ms. Spaeth's schedule changed you
9 noticed that she was still coming home at 5:00 or so; correct?

03:44 10 A. Yeah.

11 Q. And so you understood that she was leaving work earlier than
12 she should have been; correct?

13 MS. CARTER: Objection, foundation.

14 THE COURT: Overruled.

03:44 15 THE WITNESS: She said that Karen sent her home
16 because she didn't have nothing -- they were -- they didn't have
17 enough work for her so they sent her home earlier.

18 BY MR. HARLAN:

19 Q. So every time you remember seeing Ms. Spaeth home early
03:45 20 after her schedule change, you recall her saying that Karen had
21 told her to come home early?

22 A. Yeah, she didn't have nothing to do so they sent her home.

23 Q. And whether Karen actually said that or not is not something
24 that you know; correct?

03:45 25 A. No.

1 Q. Now, at some point did Ms. Spaeth tell you that Julie had
2 met with her and basically indicated she was going to get in
3 trouble if she didn't stay and work her full shift?

4 MS. CARTER: Objection, foundation. And hearsay.

03:46 5 THE COURT: Overruled.

6 BY MR. HARLAN:

7 Q. Do you need me to repeat the question, ma'am?

8 A. She never said anything to me about it.

9 MR. HARLAN: Counsel, we're at deposition page 70,
03:46 10 line 5 through 11.

11 BY MR. HARLAN:

12 Q. We're going to play something on the screen.

13 (Multimedia file played as follows:

14 "Q. Do you recall her telling you that Julia had met
03:47 15 with her and told her that she was going to get in trouble if
16 she didn't work the full shift she was assigned?

17 "A. Yes.

18 "Q. And that was prior to her leaving the company?

19 "A. Yes.")

03:47 20 BY MR. HARLAN:

21 Q. Okay, did you hear that, Ms. Barnes?

22 A. Yes.

23 Q. Does that now help you remember whether in fact she told you
24 that Julia wanted her to stay later and she was going to get in
03:47 25 trouble if she didn't?

1 A. Yes.

2 Q. And based on your discussions with Ms. Spaeth, you came away
3 from those discussions understanding -- or, I'm sorry --
4 believing that she knew that she was supposed to be staying
03:47 5 later than she was; correct?

6 A. Yeah.

7 Q. We know that Ms. Spaeth ultimately lost her position at
8 Walmart; right?

9 A. Yes.

03:48 10 Q. Were you at home on the day that she lost her position?

11 A. Yes, I was.

12 Q. So you were there when she arrived home on that day.

13 A. Yes.

14 Q. And when she came home she was crying?

03:48 15 A. Yes.

16 Q. And you tried to make her feel better; correct?

17 A. Yes.

18 Q. And one of the things you did to make her feel better is you
19 gave her a hug.

03:48 20 A. Yeah.

21 Q. And this was sometime in the afternoon on the day that she
22 lost her position; correct?

23 A. Yes.

24 Q. And then my understanding is that Ms. Spaeth called her
03:48 25 sister to let her know a little bit later in the day that she

1 had lost her position; correct?

2 A. Yes.

3 Q. And by the time she had that phone call with her sister on
4 that same day, she had stopped crying, hadn't she?

03:48 5 A. Yeah.

6 Q. And that call was about a half hour after Ms. Spaeth came
7 home; correct?

8 A. Yeah.

9 Q. So basically it was about a period of a half hour from when
03:49 10 she started crying until she ended crying and spoke to her
11 sister; correct?

12 A. Yeah.

13 Q. And on that evening where Ms. Spaeth -- on the day that
14 Ms. Spaeth lost her position at Walmart, she had supper with
03:49 15 you; right?

16 A. Yeah.

17 Q. Just like she normally did.

18 A. Yeah.

19 Q. And other than the fact that Ms. Spaeth came home and told
03:49 20 you that she had lost her position in terms of how you all
21 interacted, it was just like a normal day; correct?

22 A. Yeah.

23 Q. Now, at some point after Ms. Spaeth had stopped working at
24 Walmart, did you receive a call from Amy Jo Stevenson about the
03:50 25 fact that Walmart was going to get in contact with Ms. Spaeth

1 and let her know what she was going to get her position back?

2 MS. CARTER: Objection, compound and confusing.

3 THE COURT: If she's confused she can let us know. Do
4 you understand the question, Ms. Barnes?

03:50 5 THE WITNESS: Yes.

6 THE COURT: Can you answer it?

7 BY MR. HARLAN:

8 Q. Do you recall? I think we talked about at your deposition
9 at some point Ms. Stevenson told you and Marlo that Walmart was
03:50 10 going to be calling whether she was going to get her position
11 back.

12 A. Yes.

13 Q. And you have a good memory of that date.

14 A. Yes.

03:50 15 Q. And am I correct that one of the things that Ms. Stevenson
16 directed you to do is to go in a different room and pick up the
17 phone when Walmart called Ms. Spaeth?

18 A. Yes.

19 Q. So, in other words, she was directing you to eavesdrop on a
03:51 20 conversation between Ms. Spaeth and someone from Walmart;
21 correct?

22 MS. CARTER: Objection, that's not her testimony.

23 THE COURT: I think that's what he's asking. She can
24 answer yes or no.

03:51 25 BY MR. HARLAN:

1 Q. Do you need me to repeat the question, ma'am?

2 A. Yes.

3 Q. So essentially she was directing you to eavesdrop on a
4 conversation that was intended to be for Ms. Spaeth and someone
03:51 5 from Walmart; correct?

6 A. She just had me listen in on it. She didn't say nothing
7 about eavesdropping on it.

8 Q. Maybe it's a definitional issue. But it was clear she
9 didn't want the people at Walmart, from your understanding of
03:52 10 her directive, to know that you were listening into the
11 conversation; correct?

12 MS. CARTER: Objection, calls for speculation.

13 THE COURT: Sustained.

14 BY MR. HARLAN:

03:52 15 Q. Did you do that? Did you ultimately pick up a separate line
16 in your apartment while Ms. Spaeth was on the phone with
17 individuals from Walmart --

18 A. Yes.

19 Q. -- and listen in to the discussion?

03:52 20 A. Yes.

21 Q. And at any point during that discussion did either you or
22 Ms. Spaeth let the individual from Walmart who called know that
23 you were listening into the conversation?

24 A. No, I didn't.

03:52 25 Q. And just to be clear, you did that at the direction of

1 Ms. Stevenson; correct?

2 A. Yes.

3 Q. Another issue we talked about at your deposition is

4 Ms. Stevenson's assistance for you in applying for work at

03:53 5 Walmart. Do you recall that?

6 A. Yeah.

7 Q. At some point in time after Ms. Spaeth had left, she helped
8 you apply for a position at Walmart; correct?

9 A. Yes.

03:53 10 Q. You went to her house?

11 A. Yes.

12 Q. And she went online, yes?

13 A. Yes.

14 Q. And helped you fill out an application that was submitted;
03:53 15 correct?

16 A. Yes.

17 Q. And was Ms. Spaeth there that day?

18 A. Yeah, Marlo was there, yeah.

19 Q. And so after she completed helping you fill out that
03:53 20 application and submit it, did she help Ms. Spaeth do that?

21 A. No.

22 Q. Going back briefly to the conversation that we discussed
23 with the individual at Walmart that Ms. Stevenson had asked you
24 to pick up the other line and listen into, did she give any
03:54 25 explanation for why she couldn't be present at your apartment?

1 That's a pretty important call; right?

2 MS. CARTER: Objection, calls for speculation.

3 THE COURT: Sustained.

4 BY MR. HARLAN:

03:54 5 Q. Did you understand that call to be pretty important to
6 Ms. Spaeth?

7 MS. CARTER: Objection, calls for speculation.

8 THE COURT: Overruled.

9 THE WITNESS: She was at her store working. She
03:54 10 couldn't be at the house at that time.

11 BY MR. HARLAN:

12 Q. That raises another question I wanted to ask you. So prior
13 to Ms. Spaeth leaving Walmart, on average how many days in the
14 week would Ms. Stevenson come to your apartment?

03:55 15 A. I don't know.

16 Q. Do you recall Dr. Smith? Do you know that name?

17 A. (Nods.)

18 Q. Did Ms. Spaeth have a doctor appointment with this doctor
19 where you attended where he gave her an examination?

03:55 20 A. I don't recall that.

21 Q. Okay. Well why don't we play just a few pieces of your
22 deposition to see if that helps you remember it.

23 MR. HARLAN: If you could put up 87. Page 87, line 9
24 to 10.

03:56 25 (Multimedia file played as follows:

1 "Q. So do you recall Dr. Smith?

2 "A. Yes.")

3 BY MR. HARLAN:

4 Q. And do you recall being in a waiting room with Dr. Smith
03:56 5 when Ms. Spaeth was having an appointment with Dr. Smith?

6 A. Yes.

7 Q. Is that yes?

8 A. Yes, yeah.

9 Q. Okay. And while you were at that appointment with
03:56 10 Dr. Smith, did he ever stick his head out the door and say hey,
11 I'd like to speak with you?

12 A. I don't remember that.

13 Q. Okay. So if Dr. Smith wanted to talk to someone who was the
14 best person to understand how Ms. Spaeth's termination affected
03:57 15 her in terms of her routine or her life, you would be the best
16 person for him to speak with.

17 MS. CARTER: Objection, foundation. Calls for
18 speculation.

19 THE COURT: Sustained.

03:57 20 BY MR. HARLAN:

21 Q. Is there anyone more familiar with Ms. Spaeth in terms of
22 what she likes and the things that she does than you?

23 MS. CARTER: Objection, foundation. Calls for
24 speculation.

03:57 25 THE COURT: I think we've been over this too. I think

1 this is how we started out. Let's move on.

2 MR. HARLAN: Okay.

3 BY MR. HARLAN:

03:57 4 Q. Final question on the appointment. Am I correct that that
5 appointment was just a half hour?

6 A. I don't remember how long that was.

7 Q. Okay. I'd like to play you just a little bit of your
8 deposition. It's on page 88, lines 12 through 17. And perhaps
9 this will refresh your recollection.

03:58 10 (Multimedia file played as follows:

11 "Q. Do you recall how long you were in the waiting
12 room waiting for them to exit the appointment?

13 "A. About a half hour.

14 "Q. So you think they were in with the doctor for
03:58 15 about a half hour?

16 "A. Yeah.")

17 MR. HARLAN: Thank you.

18 BY MR. HARLAN:

19 Q. Did that help you remember how long you were in the
03:58 20 appointment with Marlo and Dr. Smith?

21 A. Yeah.

22 Q. About a half hour.

23 A. Yeah.

24 Q. Do you remember taking another trip to the Milwaukee area
03:59 25 for Ms. Spaeth to have an appointment with a Dr. Thompson?

1 A. Yeah.

2 Q. And what do you recall from -- in terms of the things that
3 Dr. Thompson had Ms. Spaeth doing?

4 MS. CARTER: Objection, foundation. Calls for
03:59 5 speculation.

6 THE COURT: Can you approach?

7 (Off-the-record discussion at side bar with all
8 counsel and the Court.)

9 BY MR. HARLAN:

04:01 10 Q. Ms. Barnes, just a few more questions. At the time of your
11 deposition I think you told me that Ms. Spaeth was working out
12 with you at the Wellness Center a couple times a week?

13 A. Yeah.

14 Q. And you also would go on walks with her?

04:01 15 A. Yeah.

16 Q. And she appeared to be happy from the time she left Walmart
17 at least until the time of your deposition; correct?

18 A. Yeah.

19 Q. And would that be through today as well, she seemed to be a
04:01 20 happy person?

21 A. Yeah, she seemed to be happy.

22 Q. In light of your relationship with Ms. Spaeth, do you all
23 share information about doctors' appointments, medical
24 information?

04:02 25 A. I don't think we talk about that at all.

1 Q. Based on living with Ms. Spaeth as long as you have, have
2 you ever been made aware that she had a medical reason to eat at
3 a certain time?

4 A. No.

04:02 5 Q. Do you recall discussing with Ms. Spaeth whether she had
6 gotten sick since living with you?

7 A. No.

8 Q. She hasn't, has she?

9 A. No.

04:03 10 Q. Ms. Barnes, thank you very much for your patience. I wish
11 you well.

12 THE COURT: Any cross?

13 MS. CARTER: Very brief. Very brief.

14 CROSS-EXAMINATION

04:03 15 BY MS. CARTER:

16 Q. Hi, Barb.

17 A. Hi.

18 Q. Do you watch TV with Marlo?

19 A. Yes, I do.

04:03 20 Q. When you and Marlo are watching TV, do you ever see Walmart
21 commercials?

22 A. Yeah.

23 Q. Does Marlo do anything when you see Walmart commercials?

24 A. She covers her face.

04:03 25 Q. Does she do that every time she sees a Walmart commercial?

1 A. Yeah. She doesn't want to look at it because it reminds her
2 of what happened when she lost her job.

3 Q. And if you're in a car and you see a Walmart truck, does
4 that -- is there anything that Marlo does that leads you to
04:03 5 believe that that causes her to remember getting fired?

6 A. (No response.)

7 Q. I'll rephrase. Actually, I'll just withdraw the question.

8 Okay. I have one question for you. You told us
9 earlier that Marlo has taken the bus to a few different places.
04:04 10 Supermarket --

11 A. Yeah.

12 Q. How do you know that? Were you with her when Marlo took the
13 bus to the supermarket?

14 A. Me and her usually go to the supermarket together.

04:04 15 Q. So when Marlo was taking the bus rides that you spoke about
16 earlier, you knew about them because you rode the bus with her.

17 A. Yeah.

18 Q. Yeah.

19 MS. CARTER: No further questions.

04:04 20 THE COURT: Okay. Thank you. You can step down,
21 Ms. Barnes.

22 (Witness excused at 4:04 p.m.)

23 THE COURT: Anything further?

24 MR. HARLAN: Yeah. May I approach, Your Honor?

04:05 25 THE COURT: You may.

1 (Off-the-record discussion at side bar with all
2 counsel and the Court.)

3 THE COURT: Would you please raise your right hand.
4 The clerk will administer the oath.

04:06 5 JULIA STERN, DEFENSE WITNESS, DULY SWORN

6 THE CLERK: Please state and spell your first and last
7 name for the record.

8 THE WITNESS: Julia Stern. J-u-l-i-a, S-t-e-r-n.

9 THE CLERK: Thank you. Please be seated.

04:07 10 DIRECT EXAMINATION

11 BY MR. HARLAN:

12 Q. Good afternoon, Ms. Stern. How are you doing?

13 A. Pretty good.

14 Q. All right. So is this your first time testifying in court?

04:08 15 A. Yes.

16 Q. I take it you're probably a little bit nervous?

17 A. Very. Very nervous.

18 Q. You're in great hands in this courtroom with Judge
19 Griesbach, so that should come as some solace for you.

04:08 20 A. Thank you.

21 Q. Where are you from originally?

22 A. Two Rivers, Wisconsin.

23 Q. Have you been in Wisconsin your whole life?

24 A. Yes, I have.

04:08 25 Q. So you're from Two Rivers; where do you live now?

1 A. In Two Rivers.

2 Q. Any children?

3 A. I have one daughter.

4 Q. Okay. And how about grandchildren?

04:08 5 A. I have three grandchildren.

6 Q. Okay. Anybody in your family have serious medical health
7 challenges?

8 A. My father had lung cancer. He was on oxygen for quite a few
9 years. He passed away in 2008. And then my sister struggled
04:08 10 with breast cancer for a number of years and she passed away
11 last January, a year ago, year and a half ago.

12 Q. Sorry to hear that. Would you tell the court and the jury a
13 little bit about your educational background?

14 A. I graduated from Roncalli High School in 1979, and then I
04:09 15 attended UW Whitewater for two years after that.

16 Q. While you were in high school did you work at all?

17 A. I did. I worked as a waitress.

18 Q. Okay. And how long did you do that?

19 A. From the time I turned 16 until I graduated high school.

04:09 20 Q. Okay. And what was your first job as an adult?

21 A. The first job as an adult? I worked some part-time jobs
22 in-between college. I worked at Lake to Lake Dairy. I worked
23 at Acandamor (ph) Kennel. The first full-time job I had was
24 M and M Restaurant, as a waitress.

04:10 25 Q. And how long did you do that?

1 A. For seven years.

2 Q. Then did you have another full-time position after that?

3 A. Then I went to Walmart.

4 Q. Okay. And how long have you been at Walmart?

04:10 5 A. 31 years.

6 Q. And what was the first position you took at Walmart?

7 A. The first position I had was as a customer service manager
8 mainly over layaway, but also oversaw the service desk and the
9 cashiers up front.

04:10 10 Q. And for those who are a little bit younger, what's layaway?

11 A. Layaway is where you choose to purchase some items and you
12 put a deposit down, we hold the items for you, you make payments
13 on it for a specific amount of time, and then you can pick them
14 up. Usually around Christmas, but at that time we had layaway
04:10 15 year round.

16 Q. Okay. And how long did you stay in that role?

17 A. Probably about four or five years.

18 Q. Okay. Then did you -- what was the next position you had at
19 Walmart?

04:11 20 A. I was over personnel and I was a department manager of
21 furniture at the same time.

22 Q. Was that at the Manitowoc location?

23 A. Yes.

24 Q. How long did you stay in that location?

04:11 25 A. About a year or two.

1 Q. Then what was the position you held at Walmart?

2 A. I was the lead supervisor over the stocking team that worked
3 from 5 a.m. till 2 p.m.

04:11 4 Q. And did you have any supervisory responsibilities in that
5 role?

6 A. Yes, I oversaw the entire team.

7 Q. Approximately how many folks would that have been?

8 A. Maybe about 15.

9 Q. Okay. And how long did you stay in that role?

04:11 10 A. Couple of years.

11 Q. Then what was next?

12 A. Then I became manager of housewares.

13 Q. And how long did you serve in that position?

14 A. I was in that position for about two years.

04:12 15 Q. Did you have any supervisory responsibility then?

16 A. I had a couple of part-time people that worked in my
17 department that I would give direction to.

18 Q. And then what was the next position you had?

04:12 19 A. Then I moved over to health and beauty aids. I was the
20 department manager for a year over there.

21 Q. Okay. And you supervised folks in that position too; right?

22 A. Yes.

23 Q. And then what was next?

24 A. And then I became an assistant manager.

04:12 25 Q. Is that the role that you're in now?

1 A. Yes.

2 Q. Okay. And are you still in the Manitowoc store?

3 A. No, I am now at the Sheboygan North store.

04:12 4 Q. How did you end up moving from Manitowoc to Sheboygan North
5 store?

6 A. Last fall the company restructured all the management team
7 and some of us got transferred to other stores. So that's how I
8 ended up in Sheboygan.

9 Q. So you would have left -- you left Manitowoc in 2020
04:12 10 sometime.

11 A. Yes. In October.

12 Q. Okay. During the time that you've been at Walmart have you
13 ever been aware of a nonmanagement associate who's had a fixed
14 permanent work schedule?

04:13 15 A. No.

16 Q. At some point you became Ms. Spaeth's supervisor; correct?

17 A. Yes.

18 Q. And at the time that you began supervising Ms. Spaeth, what
19 hours were you working?

04:13 20 A. I worked various shifts. Some days I'd come in and work
21 from like 7:00 until 5:00, sometimes it was 12:00 until 10:00,
22 sometimes it was a mid-shift in-between. It was always
23 different days and different shifts.

24 Q. So your schedule was fluctuating.

04:13 25 A. Yes.

1 Q. We had testimony about policies at Walmart. I assume since
2 you've been there Walmart has had a number of different policies
3 and procedures; correct?

4 A. Yes.

04:14 5 Q. Can you describe some of the policies that you've been made
6 aware of since you've been employed at Walmart?

7 A. Well, there's the attendance policy, there's a dress code
8 policy, a policy on selling firearms, one on selling tobacco and
9 alcohol, there's a harassment policy. Just various many, many
04:14 10 policies.

11 Q. Okay. And do the policies and procedures that you're aware
12 of at Walmart, do they change from time to time?

13 A. They change all the time.

14 Q. So how do you stay on top of a lot of policies that are
04:14 15 frequently changing?

16 A. They're listed on The Wire. The Wire is like an internal
17 internet for Walmart. And you can just look up policies and you
18 can pull up any policy that's on there and read it. When they
19 have updates they'll put an update on there for you. Home
04:15 20 office will put an update on there for you.

21 Q. And are those policies accessible to associates like
22 Ms. Spaeth?

23 A. Yes.

24 Q. And I think you mentioned certain employment policies, but
04:15 25 the company's had various employment policies since you've been

1 there; correct?

2 A. Yes.

3 Q. Since you've been at Walmart has the company had specialists
4 within the organization to help figure out what to do with
04:15 5 certain of those policies?

6 A. Yes.

7 Q. Has anyone ever informed you, in management at Walmart, that
8 there was an expectation that you know those policies chapter
9 and verse?

04:15 10 A. No.

11 Q. And so, for instance, with respect to disability, is there a
12 policy that deals with disability and reasonable accommodation?

13 A. Yes, there is.

14 Q. And if you have to make decisions or judgments or -- Strike
15 that.

16 If you're approached by someone who has an issue that
17 deals with -- that falls under those policies, are there folks
18 that you can go to at Walmart to get guidance about how to
19 handle the situation?

04:16 20 A. Yes.

21 Q. During the time that you would have been a manager, had you
22 received training on discrimination policies and disability
23 policies?

24 A. Yes, I have.

04:16 25 Q. In what form?

1 A. Mostly in the CBL form. It's a computer based learning
2 system.

3 Q. And how does that work? Are you shown a video or content
4 and have to answer questions about it?

04:16 5 A. Yes.

6 Q. I'm going to show you an exhibit that's been admitted into
7 evidence, 1000.

8 MR. HARLAN: Can you pull that up?

9 BY MR. HARLAN:

04:17 10 Q. It would be in the EEOC binders. Also on the screen to your
11 right.

12 A. Okay.

13 Q. And by the way, Ms. Stern, I think I've been calling you
14 Julia, do you go by Julie?

04:17 15 A. I go by Julie, yes.

16 Q. All right. So are you able to see that exhibit?

17 A. Yes.

18 Q. Can you tell us what that is?

19 A. This is a new hire document.

04:17 20 Q. Okay.

21 MR. HARLAN: Can we call out the third sentence in
22 Section 2?

23 BY MR. HARLAN:

24 Q. This language that's been highlighted, it says, "From time
04:18 25 to time it may also be necessary to change an associate's

1 schedules or number of hours worked, depending on the store's
2 business needs at the time."

3 Has that been the practice and understanding since
4 you've been at Walmart?

04:18 5 A. Yes.

6 Q. And then if we could look at some language in paragraph 3.

7 MR. HARLAN: Yes, if you could call that out.

8 Thank you.

9 BY MR. HARLAN:

04:18 10 Q. And it says, "Due to the nature of our business, associates'
11 working hours must remain flexible. Full-time associates will
12 work 28 or more hours a week, and peak-time associates will work
13 less than 28 hours a week. Schedules will be posted well in
14 advance of the scheduled workweek."

04:19 15 And was that the practice and policy since you've been
16 at Walmart?

17 A. That was the policy back then, yes.

18 Q. So was that an important aspect of an associate's job, to
19 basically be flexible?

04:19 20 A. Yes.

21 Q. And why is that something that's important for Walmart
22 associates?

23 A. Being that it's retail, you have to run your business and be
24 staffed for your business when your customer is available in the
04:19 25 store. So different times of the week -- you know, weekends and

1 nights it's busier than during the day. Holidays, the first
2 weekend of the month is usually busier. So you have to have a
3 flexible schedule in order to cover that customer service.

04:19 4 Q. Throughout the time that you have been at Walmart has the
5 company had an attendance policy in place?

6 A. Yes.

7 Q. And, in general, what does the policy require?

8 A. It requires you to be at work during your scheduled shift.

04:20 9 Q. And how about completing the shift, is that also part of the
10 policy?

11 A. Yes, working your entire shift.

12 Q. And at any point in time since you've been at Walmart has
13 anyone in management ever suggested that the attendance policy
14 wasn't something the company took seriously?

04:20 15 A. No.

16 Q. In fact, had you ever been employed anywhere where
17 attendance wasn't an important aspect of a job?

18 A. No, it's very important.

04:20 19 Q. During the time that you have been at Walmart did you have
20 an understanding of certain things that associates can do that
21 can lead to discipline?

22 A. Yes.

04:21 23 Q. And what kind of things that you observed during your time
24 at Walmart that lead to associates getting in trouble and being
25 disciplined?

1 A. Mostly it is with the attendance, but if they are harassing
2 someone or if they're not being productive, things like that.

3 Q. And based on your experience, ma'am, what's the most
4 frequent basis for associate discipline at Walmart?

04:21 5 A. Attendances.

6 Q. When did you first get to know Ms. Spaeth?

7 A. When she started working in the store.

8 Q. And that's a period before you were her manager?

9 A. Right. That was when I was still an hourly associate.

04:21 10 Q. And what was your relationship like with her?

11 A. It was casual, like, you know, hello, how are you.

12 Q. Ever discuss sports with her?

13 A. A little bit with the Packers. Not too much. I'm not a
14 Packer fan or football at all so -- but she was.

04:22 15 Q. And at some point you became Ms. Spaeth's manager; correct?

16 A. Right.

17 Q. Approximately when was that?

18 A. That would have been in 2014, probably around fall.

19 Q. And how is it that you became her manager?

04:22 20 A. Every once in a while they rotated the management team. So
21 I had been on overnights and they rotated us around to different
22 areas.

23 Q. So during the time that you had been a manager, did you ever
24 have a policy or practice of letting associates leave just on a
04:22 25 regular basis before the completion of their shift?

1 A. No.

2 Q. Can you describe what your relationship was like with
3 Ms. Spaeth once you became her manager at the outset?

4 A. It was pretty much the same. It was still, you know, hello,
04:22 5 how are you. I did give her direction which she would follow.

6 Q. And the direction that you gave Ms. Spaeth, was that typical
7 of how you worked with other associates who reported to you?

8 A. Yes.

9 Q. Do you recall any situations where she appeared to be angry
04:23 10 with you over anything?

11 A. No.

12 Q. Did you have any difficulties managing her?

13 A. No.

14 Q. So we've heard that the scheduling process at the Manitowoc
04:23 15 store changed -- Strike that.

16 Prior to Thanksgiving time 2014, am I correct that the
17 management in the Manitowoc store kind of set schedules;
18 correct?

19 A. Yes.

04:23 20 Q. The Smart System would generate schedules, but the
21 management had the ability to set schedules; correct?

22 A. We could adjust the shifts, yes.

23 Q. Okay. Were there any drawbacks to that process from your
24 perspective?

04:24 25 A. It was more time consuming in order to do schedules.

1 Q. How about in terms of the efficiency of it, did it have --
2 did it put personnel-

3 MS. VANCE: Objection, leading.

4 THE COURT: Overruled.

04:24 5 BY MR. HARLAN:

6 Q. Did it create any efficiency issues from your perspective?

7 A. It would take us longer to do the schedules that way, yes.

8 Q. Okay. Now, at some point around Thanksgiving of 2014, there
9 was a change in terms of how the schedules were done; correct?

04:24 10 A. Yes.

11 Q. And was there a directive given to the managers in the
12 Manitowoc store?

13 A. Yes.

14 Q. And what was the directive?

04:24 15 A. The directive was, and it came from the home office, changed
16 all across the company. So the directive was that we were to
17 allow the schedules to be generated and run them as they were
18 generated and not make adjustments to them unless it was a
19 specific business need.

04:25 20 Q. Okay. And how did that policy change affect the associates
21 in the store, if at all?

22 A. A lot of the part-time associates had to adjust their hours.
23 Whether it was working later at night or working more on the
24 weekends, they had to adjust their schedules.

04:25 25 Q. Okay. And was there any relief given to the associates in

1 terms of helping them make the adjustments necessary because of
2 the new schedules?

3 A. Yes. We gave them a few weeks to make adjustments. Like if
4 they needed to find new child care, or if they needed a way to
04:25 5 get to work, or transportation issues, anything like that. So
6 they would have a chance to get those taken care of.

7 Q. Did you observe whether this change in the scheduling
8 process had an impact on Ms. Spaeth's schedule?

9 A. Her schedule changed from 12:00 to 4:00 to 1:00 to 5:30. So
04:26 10 it shifted approximately an hour later.

11 Q. Was this a significant change from your perspective?

12 A. No.

13 Q. And how did the change that Ms. Spaeth experienced with the
14 new scheduling process compare to some of the other associates
04:26 15 in the store?

16 A. That was a minor change. Her schedule basically only
17 shifted one hour later, whereas a lot of the other ones had to
18 pick up different days or have more hours. Longer hours.

19 Q. Ms. Stern, it might make sense -- do you prefer looking at
04:26 20 the paper or looking on the screen?

21 A. Probably the paper.

22 Q. Pardon?

23 A. The paper would be easier to see.

24 Q. Okay. Let me help you get that.

04:27 25 A. It's a big binder. Okay.

1 Q. All right.

2 (Exhibit 1006, Spaeth Attendance History - 01/2012 -
3 07/08/2015 [D002542 - D002551; D002553 - D002571], admitted
4 previously by stipulation.)

5 BY MR. HARLAN:

6 Q. Can you identify what Exhibit 1006 is?

7 A. It's an attendance tracking. It tells what time she was
8 scheduled each day and when she clocked in and out.

9 Q. So looking at that exhibit are you able to tell -- if you go
04:28 10 to page D2547 -- are you able to tell whether she was assigned a
11 shift on November 21st?

12 A. Yes.

13 Q. What was her shift on that day?

14 A. On November 21st she was assigned a 12:00 to 4:00 shift.

04:28 15 Q. Okay. And that was the shift that she normally worked;
16 correct?

17 A. Yes.

18 Q. And what time did she leave on that day?

19 A. She left at 13:41.

04:28 20 Q. What does that translate to us nonmilitary folks?

21 A. 15:41. So that's 3:41 in the afternoon.

22 Q. So am I correct then that on that day, when she was working
23 the shift that she normally worked, she left early?

24 A. Yes.

04:29 25 Q. Was she authorized to leave early on that day?

1 A. No.

2 Q. And then if you could look at November 24th. I think that's
3 on page D2548. Can you tell us what shift she was assigned on
4 that day?

04:29 5 A. She was scheduled to work from 1:00 to 5:30.

6 Q. And did she work her entire shift on that day?

7 A. No, she did not.

8 Q. Was she authorized to leave on that day?

9 A. No.

04:29 10 Q. Okay. How about on the 25th?

11 A. On the 25th she was scheduled to work 12:00 to 4:00.

12 Q. And what time did she leave on that day?

13 A. She left at 3:39.

14 Q. So she didn't complete the shift scheduled as she was
04:29 15 accustomed to working; correct?

16 A. Right.

17 Q. And then how about on the 26th?

18 A. On the 26th she was scheduled from 1:00 to 5:30. And she
19 left at 4:30.

04:30 20 Q. Okay. How about on December 1st, are you able to tell what
21 her shift was on that day?

22 A. On December 1st she was scheduled from 1:00 to 5:30, and she
23 left at 4:19.

24 Q. So did she complete her shift on that day?

04:30 25 A. No.

1 Q. So you just told us that there were a number of shifts in
2 November-December that Ms. Spaeth left early for. Were her
3 early departures on those days a violation of attendance policy?

4 A. Yes.

04:30 5 Q. Would it call for certain action under the attendance
6 policy?

7 A. Yes.

8 Q. And was any taken?

9 A. No.

04:30 10 Q. And why was no action taken?

11 A. That was during the transition period that we were giving
12 them to make adjustments to the new schedule.

13 Q. Okay. And who made the decision to, in this instance, give
14 Ms. Spaeth an adjustment period so she could get acclimated to
04:31 15 the new schedule?

16 A. It was kind of a between all of management that we allowed
17 that for the entire store.

18 Q. And that would include you; correct?

19 A. Yes.

04:31 20 Q. Were you obligated to give this adjustment?

21 A. No.

22 Q. So as -- you can set that aside for a few seconds. So as
23 Ms. Spaeth's manager, I take it you're familiar with her work
24 and how she performed during that period?

04:31 25 A. Yes.

1 Q. And what would be your general assessment of her
2 performance?

3 A. She wasn't completing her tasks as she wasn't working her
4 full shift.

04:31 5 Q. On the occasions I think you testified that you would give
6 her work direction, on the occasions where you asked her to do
7 something did she seem to understand from your perspective what
8 she was being asked to do?

9 A. Yes.

04:32 10 Q. And what leads you to conclude that she understood the
11 direction that you were giving her?

12 A. Well, at first all she would do is fold towels, and so we
13 got her to start zoning other areas in the housewares
14 department. Zoning is where you straighten all the merchandise
04:32 15 on the shelf so it looks nice for the customers. And she would
16 do that on a regular basis after we walked through it with her a
17 couple of times.

18 Same with getting returns from the service desk, she
19 would get those and put them away, which is something that she
04:32 20 hadn't done before either.

21 Q. During the time that you imagined Ms. Spaeth, did she have
22 any kind of job coach or someone that was helping to communicate
23 work direction you were giving to her?

24 A. No.

04:33 25 Q. And what are some of the tasks -- new tasks that you asked

1 her to perform?

2 A. The new tasks would have been zoning and then the housewares
3 as well, and the returns.

4 Q. And based on this new schedule, in terms of just the
04:33 5 day-to-day tasks, after she got a new schedule, the 1:00 to 5:30
6 schedule, did that impact how she did her job in any way in
7 terms of the specific tasks that you --

8 A. No, just that she wouldn't get them completed when she left
9 early.

04:33 10 Q. And so once her schedule changed she didn't seem bewildered
11 in any way?

12 A. No.

13 MS. VANCE: Objection, calls for speculation.

14 THE COURT: Overruled.

04:33 15 BY MR. HARLAN:

16 Q. She didn't lose -- she didn't forget how to do the tasks
17 that she used to do before her schedule changed; correct?

18 A. Correct.

19 Q. So based on your experience at Walmart are there particular
04:34 20 points in a year that are busier than others?

21 A. Yes.

22 Q. And would Christmas, Thanksgiving, and Black Friday be some
23 of those times that are extremely busy?

24 A. Very busy, yes.

04:34 25 Q. Okay. And based on the fact that those are particularly

1 busy times at Walmart, has the company made any kind of
2 scheduling adjustments to deal with that?

3 A. Yes, we have.

4 Q. Explain.

04:34 5 A. Well, especially like for Black Friday, it's pretty much
6 like all hands on deck. So if there's associates that don't
7 normally work on that day or they're not available that day, we
8 would get with them and talk to them and see if we can get them
9 to work that day to help cover the customer traffic because it
04:35 10 is very, very busy.

11 Q. Okay. So going back to 1006, can you look at Ms. Spaeth's
12 attendance record and see if there was a Black Friday in 2014
13 that she was assigned to work.

14 A. Do you know what the date was?

04:35 15 Q. I think it's on page D2548.

16 A. It doesn't tell me if it's a Friday in here or not. So --

17 Q. Do you recall if she was assigned to work Black Friday on --
18 in 2014?

19 MS. VANCE: Objection, foundation.

04:35 20 THE COURT: That's what he's trying to -- I mean, does
21 she recall? If she doesn't -- you don't know when Black Friday
22 was in 2014, do you?

23 THE WITNESS: Right.

24 THE COURT: Yeah, me either.

04:36 25 MR. HARLAN: Can we put up 1014?

1 BY MR. HARLAN:

2 Q. Okay. This is an email that you wrote on December 17th. Do
3 you recall this situation, Julie?

4 A. Yes.

04:36 5 Q. Can you give us some background at what prompted you to have
6 this discussion that's reflected in the email?

7 A. Because Marlo had consistently been leaving early, I had a
8 discussion with her about her attendance and the importance of
9 working her scheduled shifts.

04:37 10 Q. And why was that an issue that prompted the discussion?

11 A. Because with her leaving early her stuff wasn't getting done
12 and I would have to find someone else to do that so it would get
13 completed.

14 Q. Okay. And based on what her attendance had been, as of this
04:37 15 date could you have issued her a coaching?

16 A. Yes, I could have.

17 Q. But you didn't; correct?

18 A. No.

19 Q. And this is after the grace period; correct?

04:37 20 A. Yes.

21 Q. Did she offer any explanation for why she was violating the
22 attendance policy?

23 A. She was afraid she would miss the bus.

24 Q. Okay. Did she make any reference to her Down syndrome
04:38 25 condition at all in your discussion with her on this date?

1 A. No.

2 Q. Did she say or do anything when you met with her on the 17th
3 that caused you to believe that she didn't understand what the
4 expectations were?

04:38 5 A. No.

6 Q. Or that she didn't understand what you were communicating to
7 her?

8 A. No.

9 Q. And why did you send this email?

04:38 10 A. As documentation that I had this conversation with her.

11 Q. And one of the things you communicated to her was that on a
12 go-forward basis you expected her to work her entire shift;
13 correct?

14 A. Yes.

04:38 15 Q. I think you make reference to being consistent on the
16 attendance policy?

17 A. Uh-huh, yes.

18 Q. Why was that something that was important from your
19 perspective?

04:39 20 A. Well, if you're not consistent with all the associates, for
21 one they can accuse you of showing favoritism towards one person
22 and not towards another.

23 The other one is, you want to make sure that no one is
24 going to come up and -- if you let one person dictate what hours
04:39 25 they want to work, then everybody can come up and start saying,

1 well, I don't want to work this shift, I want to work these
2 hours, and then you can't run your business that way. They're
3 scheduled for a reason.

04:39 4 Q. Okay. You also, with respect to the issue she raised about
5 the bus, pointed out that the bus runs until 8:00.

6 A. Yes.

7 Q. How did you know that?

8 A. We had a bus schedule.

04:39 9 Q. Okay. And what was her response to what was being
10 communicated to her in this meeting?

11 A. She just was worried about getting home on time for supper.
12 And then while I was talking to her then she just kind of shut
13 down and wouldn't talk back.

04:40 14 Q. Had you ever experienced a situation with an associate who
15 you were addressing some performance issue with where, as you
16 were providing that feedback, they didn't say anything?

17 A. Yes.

18 Q. It's not unusual; correct?

19 A. No, it's not.

04:40 20 Q. I think there's also a reference to talking, that she was
21 going to talk to her sister?

22 A. She wanted to talk with her sister to make sure that she
23 knew she was not going to be home on time for supper.

24 Q. And what was your understanding of who she was referring to?

04:40 25 A. Her sister that she lived with.

1 Q. Okay. Did you know anything about Amy Jo Stevenson at that
2 point?

3 A. No, I had never heard of Amy Jo.

4 Q. Did she mention that in the meeting at all, Amy Jo by name?

04:41 5 A. No.

6 Q. If Ms. Stevenson wanted to contact you at the Manitowoc
7 Walmart, what would she have to do to get hold of you?

8 A. Just call the store and ask for me.

9 Q. Okay. So from your perspective would that be something
04:41 10 relatively easy to do?

11 A. Very easy to do.

12 Q. There's also a reference to her leaving early and saying
13 that Karen had told her that she could leave?

14 A. Yes. She told me that she had talked with Karen in
04:41 15 personnel and that she was going to leave early so she could go
16 home and talk with her sister.

17 Q. And that's Karen Becker; correct?

18 A. Yes.

19 Q. And it looks like, according to this email, that you found
04:41 20 out that that was not the case; correct?

21 A. Right. After she had left I went and I talked to Karen and
22 Karen said she had never come to talk to her.

23 Q. How did that make you feel?

24 A. Kind of betrayed. Like she was trying to be sneaky about
04:42 25 leaving.

1 Q. Does the company -- throughout the time that you've been
2 there does the company have a policy on dishonesty?

3 A. Yes.

4 Q. Is that a basis for discipline?

04:42 5 A. Yes.

6 Q. So if employees/associates are dishonest in terms of
7 misrepresenting things in terms of their work, is that a basis
8 for them to get disciplined?

9 A. Yes.

04:42 10 Q. And did you know that at the time of this email?

11 A. Did I know about the policy?

12 Q. Yeah --

13 A. Yes.

14 Q. -- that that policy was in place. And did you discipline
04:42 15 her under that policy?

16 A. No, I did not.

17 Q. So at some point she mentioned wanting to work noon to 4:00.
18 And what did you think when you heard that from Ms. Spaeth?

19 A. That that was just a comment like anyone else would make
04:43 20 that they wanted to go back to their original shift that they
21 had.

22 Q. Did you understand her to be making any sort of request for
23 reasonable accommodation under the ADA?

24 A. No.

04:43 25 Q. Did she saying anything that caused you to think that asking

1 to go from -- go back to the noon to 4:00 schedule had something
2 to do with her Down syndrome or some limitation connected to it?

3 A. No.

04:43 4 Q. And as a manager, what is the impact of Ms. Spaeth not
5 filling her work shifts and leaving early?

6 A. Anytime that she would leave early it would leave her work
7 unfinished. So I would have to find someone else to do her
8 work, plus their own which is putting excess burden on them.
9 And if it didn't get done, you know, it affects the customer;
04:44 10 the store is not presentable for the customer, the merchandise
11 isn't in the correct place for them to purchase it.

12 MR. HARLAN: Can we put up 1010, Tracy.

13 (Exhibit 1010, Associate Attendance Personal
14 Discussion Log [D000118], admitted previously by stipulation.)
04:44 15 BY MR. HARLAN:

16 Q. Showing you what's been admitted as Trial Exhibit 1010, do
17 you know what this is?

18 A. It's a personal discussion log for attendance.

19 Q. And what's the purpose of the log?

04:44 20 A. The log is so when you have a discussion with an associate
21 and it's not a coaching, you document it in here. That way if
22 say I would switch positions with someone and another assistant
23 would come on and they were going to have a discussion with her
24 as well for the attendance, they can look in here and say, oh,
04:45 25 there's already one in here so I would go to the coaching level

1 next.

2 Q. Okay. And there's an entry on 2/3/12, and whose name is
3 that?

4 A. Bonnie Popp.

04:45 5 Q. And then there's a witness listed and who is that?

6 A. Karen Becker.

7 Q. So what does that mean when you see that entry on this
8 particular exhibit?

9 A. That they had a discussion with her about her attendance on
04:45 10 that date.

11 Q. Okay. And that date being February 3rd, 2012?

12 A. Correct.

13 Q. And am I correct that would have been before her schedule
14 change?

04:45 15 A. Yes.

16 Q. So she would have been working noon to 4:00 at the time that
17 there was a discussion with her about her attendance.

18 A. Yes.

19 Q. And then your name is also on the form?

04:46 20 A. Yes.

21 Q. And that basically is just documentation of the discussion
22 that you had with her on the 17th; correct?

23 A. Right.

24 Q. All right. So at some point you gave her a coaching;
04:46 25 correct?

1 A. Yes, I did.

2 Q. Did you have any discussions with her about her attendance
3 between that coaching and the personal discussion you had with
4 her on the 17th?

04:46 5 A. No.

6 MR. HARLAN: We can pull up 1012.

7 (Exhibit 1012, Coaching - December 17, 2014 [Dkt.
8 102-24], admitted previously by stipulation.)

9 BY MR. HARLAN:

04:46 10 Q. Is this the coaching, the first coaching you had with
11 Ms. Spaeth about her attendance?

12 A. Yes.

13 Q. I'll just call out the impact section. Could you read that
14 for us?

04:47 15 A. "When Marlo does not work her scheduled shifts there is a
16 lack of customer service as well as completing her tasks. This
17 results in fellow associates having to finish her tasks, and
18 possible loss of customer sales."

19 Q. So she was scheduled to work on 12/18 and 12/29 in 2014, and
04:47 20 her shift was 1:00 to 5:30, and according to this she left at
21 around 3:00; correct?

22 A. Yes.

23 Q. That would be early under her prior schedule; correct? Her
24 prior shift of noon to 4:00; correct?

04:48 25 A. Yes.

1 Q. What was the activity like in the store on December 18th and
2 December 19th?

3 A. That would have been --

4 MS. VANCE: Objection, foundation.

04:48 5 BY MR. HARLAN:

6 Q. Do you know what the activity was like on November -- I mean
7 on December 18th and December 19th at that particular time of
8 the year?

9 A. That was during our holiday rushes right before Christmas,
04:48 10 so it would have been very busy in the store.

11 Q. All hands on deck?

12 A. Yes.

13 Q. So were there implications in terms of service as a result
14 of Ms. Spaeth not staying her full shift on those two days?

04:48 15 MS. VANCE: Objection, leading.

16 THE COURT: Overruled.

17 THE WITNESS: Yes.

18 BY MR. HARLAN:

19 Q. Explain that.

04:48 20 A. Well, if she wasn't there, if customers had a question about
21 where something was she wouldn't have been able to show them.
22 Putting the things away that needed to get put away so it would
23 be available for the next customer to purchase wasn't happening
24 because she wasn't there to do it.

04:49 25 Q. What kind of effect on zoning, the zoning activity that

1 takes place in the stores, is there when there is a lot of
2 activity?

3 A. When there's a lot of customers the store gets pretty messy.
4 Things -- you know, people look at stuff and they just kind of
04:49 5 drop it. So in order to maintain that it looks nice and it's
6 shoppable, we have to go through and zone everything.

7 Q. So at the time of this first written coaching --

8 (Court reporter interruption.)

9 MR. HARLAN: I'm sorry.

10 BY MR. HARLAN:

11 Q. So as of the time of this coaching did you have any concern
12 about whether Ms. Spaeth understood what her expectations were
13 in terms of the schedule?

14 A. No.

04:49 15 Q. How did it make you feel to have to give her this coaching?

16 A. I don't like to coach anyone. It's not a pleasant
17 experience. It's like reprimanding someone. I would rather
18 work with them and try and get them to change their behavior.
19 And I tried that previously with her, but ultimately you have to
04:50 20 follow what the procedures are.

21 Q. Okay. So after this first written coaching did you notice
22 any change in terms of her adherence to the schedule that she
23 received?

24 A. After the first one for a couple of weeks she started
04:50 25 working closer to her 1 to 5:30's.

1 Q. Okay. And did that last?

2 A. No.

3 Q. Did you create any documentation as a result of kind of the
4 continued attendance problems after this first written coaching?

04:51 5 A. No.

6 Q. Did you do an email kind of describing sitting down talking
7 to her again?

8 A. Not -- no.

9 Q. Okay.

04:51 10 MR. HARLAN: Why don't we put up 1015, please.

11 (Exhibit 1015, Email from Julia Stern - January 13,
12 2015 [D000396], received in evidence.)

13 BY MR. HARLAN:

14 Q. Can you tell us what 1015 is?

04:51 15 A. That is an email that I sent about having a discussion with
16 her.

17 Q. Okay. So you note in here --

18 MR. HARLAN: Maybe we can call it out, the section
19 about the bus.

04:52 20 BY MR. HARLAN:

21 Q. So you mentioned that at the coaching she was continuing to
22 talk about concern about missing the bus?

23 A. Yes.

24 Q. And what did you think about that explanation for why she
04:52 25 wasn't staying and fulfilling her shift?

1 A. It was just an excuse that she wanted to leave early.

2 Q. So based on what you're communicating in this email, from
3 your perspective it was important for Ms. Spaeth to work those
4 shifts; correct?

04:52 5 A. Yes.

6 Q. And to complete the shifts.

7 A. Yes.

8 Q. Walmart is a major company, it's a big company; right?

9 A. Yes.

04:52 10 Q. Employs a lot of people; right?

11 A. Yes.

12 Q. So why is it a big deal if Ms. Spaeth leaves early? Why is
13 that a problem?

14 A. If she was allowed to leave early all the time then the
04:53 15 other associates would have wanted to do the same thing. And
16 eventually then you don't have anyone covering the store.

17 THE COURT: You can start looking for a good time to
18 break, Mr. Harlan.

19 MR. HARLAN: Okay. Thank you, Your Honor.

04:53 20 BY MR. HARLAN:

21 Q. You also make reference to her staying productive in zoning
22 all of housewares. Why was that a concern that you noted?

23 A. Because when she was leaving early that wasn't getting done
24 unless we would find someone else to take care of that.

04:53 25 Q. Okay. And had you spoken to her previously about that?

1 A. Yes.

2 MR. HARLAN: If you could just call out the last
3 sentence.

4 BY MR. HARLAN:

04:54 5 Q. It says a while later on the sales floor she came up and
6 apologized to you?

7 A. Yes, she did.

8 Q. And she said that she knew she was wrong for departing early
9 from her shifts; correct?

04:54 10 A. Yes.

11 Q. How did that make you feel?

12 A. It made me feel like -- almost like a mom where you finally
13 get your child to understand something. It made me feel like
14 she cared about her job and that, you know -- it made me feel
04:54 15 good that she was acknowledging it.

16 Q. And you felt like you were getting through to her?

17 A. Yes.

18 MR. HARLAN: That's all.

19 THE COURT: Okay. We'll break for the day. Please be
04:54 20 back in the jury room at 8:30. We'll try and start right away
21 tomorrow at 8:30. We're on schedule. Things are going well.

22 Have a good evening. Remember not to discuss the
23 case, keep your mind open until you hear everything.

24 (Jury out at 4:54 p.m.)

04:55 25 THE COURT: You can step down, Ms. Stern.

1 (Witness excused for the day at 4:55 p.m.)

2 THE COURT: We're outside the presence of the jury.

3 Does anybody have anything you want to place on the
4 record?

04:55 5 MS. VANCE: Could we have the sequestered witness step
6 out?

7 THE COURT: Yes. You may step out, please.

8 MR. MULAIRE: Nothing from the plaintiff.

9 THE COURT: Okay. Did you want to make that motion?
04:55 10 Or do you want to do it in the morning or reserve it for later?

11 MR. HARLAN: Yes, maybe before we get started tomorrow
12 I'll do it.

13 THE COURT: Okay. So --

14 MR. HARLAN: I don't think you want to hear it right
04:55 15 now.

16 THE COURT: 8:15 if you want to do it tomorrow. Okay?
17 Because we have the jury at 8:30 and I don't keep them waiting.
18 Or you can do it later.

19 MR. HARLAN: Yeah, maybe later. I don't want to screw
04:56 20 up everybody's schedule in the morning.

21 MR. MULAIRE: You could wait until after the verdict.

22 (General laughter.)

23 MR. HARLAN: I suspect I'm going to be doing that
24 anyway.

04:56 25 THE COURT: I have a couple of copies of a draft, a

1 jury instruction draft and verdict form. So why don't I -- I
2 have two per side, I should have done three per side but I'm
3 cheap.

4 Go ahead, take a look at those, and once you have a
04:56 5 chance to look at those tomorrow we'll have a discussion on that
6 and see where we go.

7 MR. HARLAN: Do you prefer to just, you know, have us
8 discuss it with you as opposed to trying to file something? Is
9 that the most efficient way for you to deal with it?

04:56 10 THE COURT: Well, I don't need briefs. I like
11 letters. Just short. If you have a different proposal and the
12 authority. Those are based on the cases you kind of sent to us
13 and we've looked at.

14 MR. HARLAN: Okay.

04:56 15 THE COURT: I think I kind of have tried to,
16 in-between things, read those cases more carefully as I've seen
17 the evidence unfold.

18 But I have no doubt that you're going to have some
19 recommendations and objections. What I will typically do is,
04:57 20 once you've had a chance to look it over and you formulate your
21 positions, we'll do kind of an informal conference. I hate to
22 put it all on the record because court reporters are valuable
23 resources and so we only use them when we need to, at the end.
24 But once we formulate things we'll have a chance for everyone to
04:57 25 make their record, okay?

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MR. HARLAN: Thank you.

THE COURT: Have a good evening, everyone. We'll see
you tomorrow.

(Proceedings concluded for the day at 4:58 p.m.)

* * *

C E R T I F I C A T E

I, JOHN T. SCHINDHELM, RMR, CRR, Official Court Reporter for the United States District Court for the Eastern District of Wisconsin, do hereby certify that the foregoing pages are a true and accurate transcription of my original machine shorthand notes taken in the aforementioned matter to the best of my skill and ability.

Signed and Certified July 25, 2021.

/s/John T. Schindhelm

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